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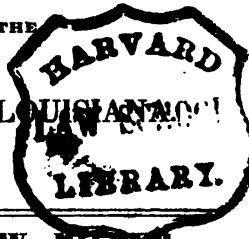
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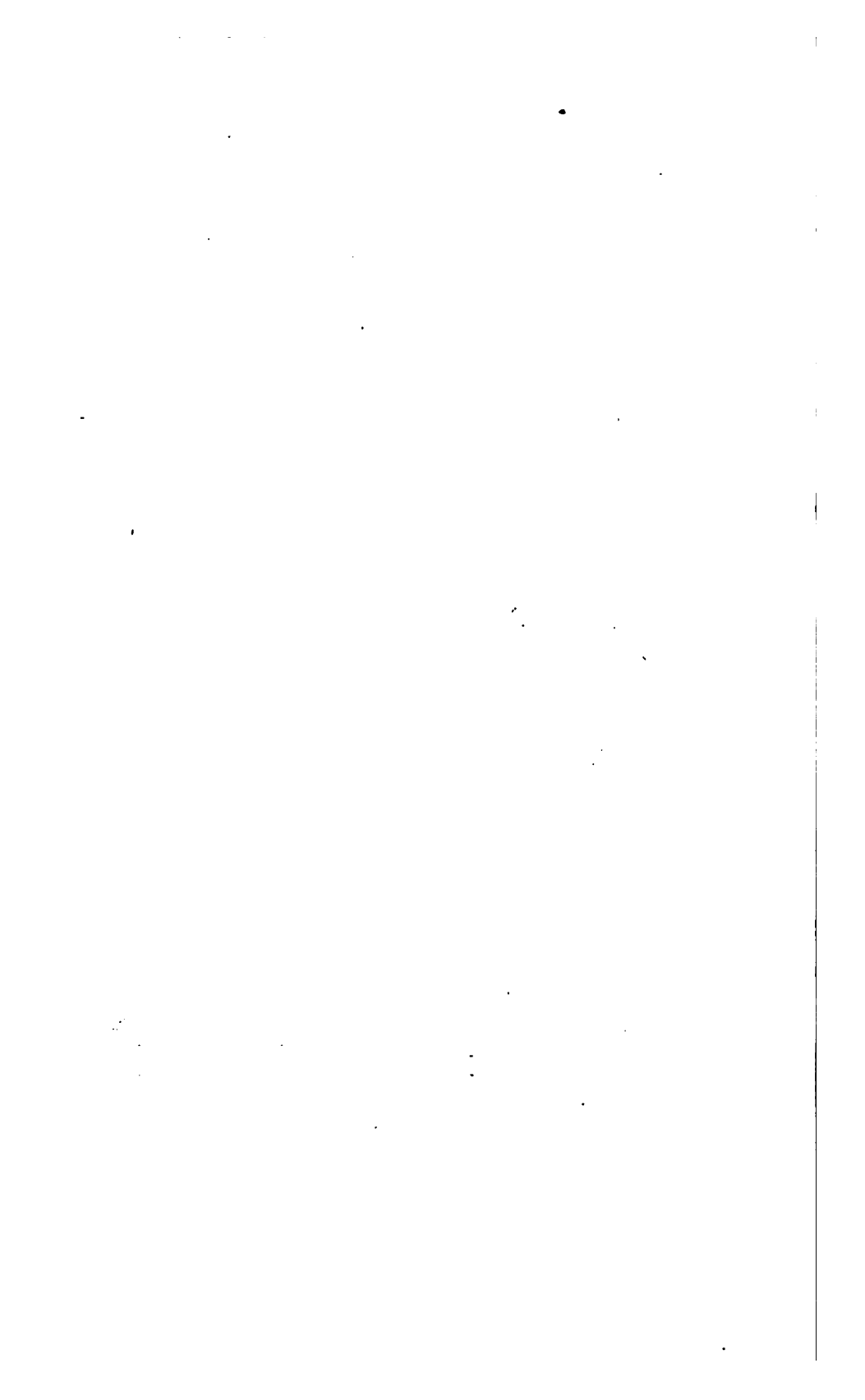


BY BRANCH W. MILLER,
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VOLUME II.

NEW ORLEANS:
PRINTED BY JEROME BAYON,
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1832.



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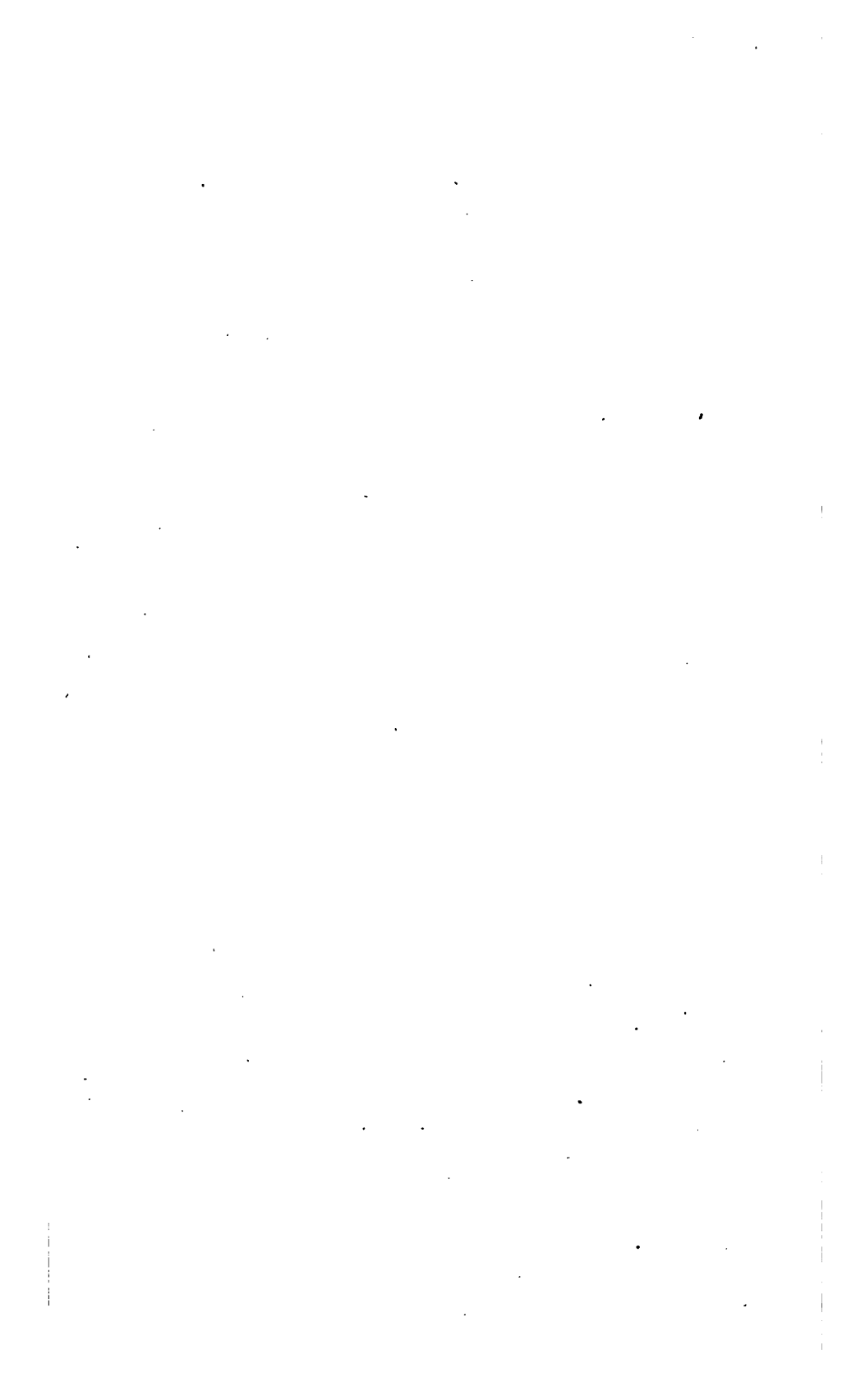
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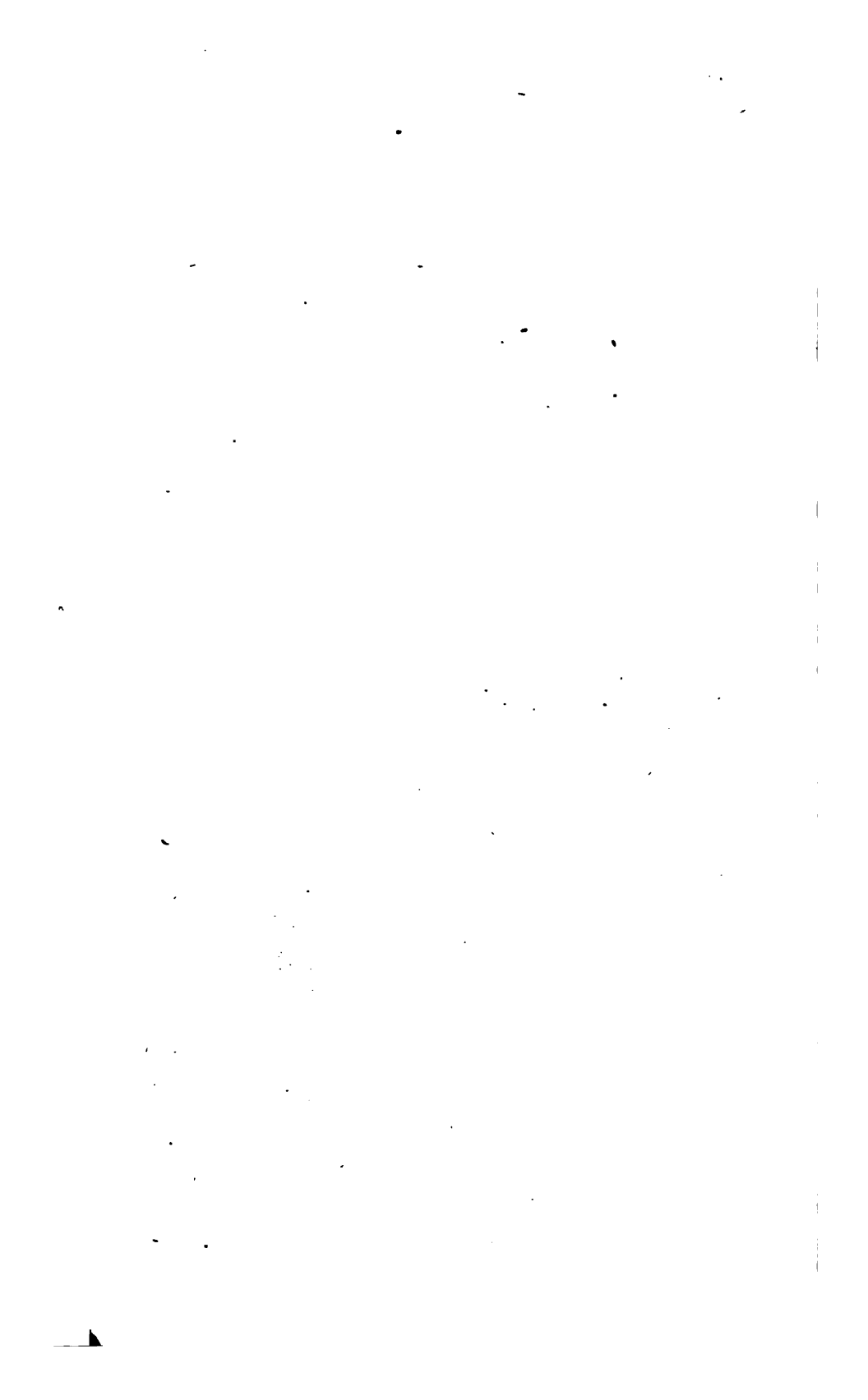
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PORTER, JUSTICE, did not join in the opinions delivered in the months of September and October, in the year 1830, being absent from the state by leave of the legislature.



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
Supreme Court
OF THE
STATE OF LOUISIANA.

SUPREME COURT—WESTERN DISTRICT,
OPELOUSAS.....SEPTEMBER 1830.

BERARDS' HEIRS vs. BERARD.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF *sixth* PRESIDING.

In a suit for the price of a tract of land sold, the defendant may successfully *resist* payment on account of error falling on the substance of the thing sold.

Where a back concession is authorised to be located in the rear of the ancestor's plantation; and in the life time of the latter, he and his son locates it in a more advantageous position. At the sale of the ancestors' succession, the proces-verbal of the sale purports to sell only the inchoate title or right to the concession—the son who purchases through an agent at sale, will be considered as having purchased the located tract which is most advantageous to him, and not the right to locate it in rear of his ancestors' plantation.

And on being sued for the price of the purchase according to the proces-verbal of sale, he will be deemed to have purchased in error affecting the substance of the thing sold.

On the 8th of December 1821, Jean-Baptiste Berard purchased, thro' the agency of his son, at the sale of his fathers' succession, a back concession of land, containing twelve arpents front with the depth of forty, for the sum of

Western District.
 September, 1830.

~
BERARD'S
HEIRS
vs.
BERARD.

21	1
44	840

CASES IN THE SUPREME COURT

Western District.
September, 1880.

BERARD'S
HEIRS,
vs.
BERARD.

\$1,600. The land was described in the proces-verbal of sale as lot No. 139, consisting of wood, *as sold as uncultivable land*. His co-heirs and the heirs of Jean Berard deceased, brought suit for the portion coming to them from their fathers' succession. The defendant had refused, and still *resisted* payment on the ground that he purchased in error; and that if ever the land in question was adjudicated to him, it was without his consent. That it never was delivered to him, and cannot be; as it never was located.

It seems that when the right accrued to this back concession which was in the life time of the ancestor Jean Berard deceased, he and his son, the present defendant, located in a more advantageous position about two miles from the ancestor's original tract. It appears the defendant authorised his son to bid for the land thus *located*, and which had been surveyed, at the sale of the ancestor's succession, when in fact only the incoate right or title to the succession was sold, and which was to be located in the rear of the ancestor's original tract.

The District Court gave judgment against him on the ground that the error seemed to consist of his supposing that altho' the title called for land in one place, it had been located in another. In the proces-verbal of sale the land is described as situated according to the calls of the original title and not as surveyed. By signing that *proces-verbal*, it appears to the Court that the purchaser admitted the thing acquired by him was *right* of the estate in that grant with the chance of a more advantageous location. The impression that he had taken up, that the land might be located in another place does not in the opinion of the Court shew such an error as annuls the contract &c.

Bowen for plaintiffs.—The defendant purchased the land with a full knowledge of the title and locations, and all the circumstances attending it. He lived near it—had been present at the surveying and knew the situation of the ori-

ginal concession—and also the location which was made in the life time of his father.

Western District.
September, 1830.

The land sold and contained in the proces verbal of sale, was the original grant or concession. This the defendant well knew before he signed the proces verbal. He cannot claim the advantage of having brought in error.

BERNARD'S
HEIRS,
vs.
BERNARD.

The defendant bought with a knowledge of both locations and took his chance of getting the best. It was a kind of *aleatory* contract. At any rate, in either event he would have got a tract of nearly equal worth. 6th. Toullier 144. No. 38—39—40—41. Louisiana Code, Art. 1819—20.

Simon & Brownson for defendant and in reply :

The defendant purchased entirely in error, so much so that when the first instalment became due, he publicly stated it was not the tract he intended to buy.

That his son had attended the sale and bid for him, it was adjudicated to him.

Buying a piece of land in one place when it is situated in another, is error.—5 Part, Tit. 5, Law 20, 1 Pothier on obli. Nos. 17—18.

Mathews J. delivered the opinion of the Court.

This suit is brought to recover from the defendant the price of a tract of land said to have been adjudicated to him at the sale of the succession of his father ; he being a co-heir with the plaintiffs &c. Payment is resisted by him on account of error falling on the substance of the thing sold. The plaintiffs obtained judgment in the Court below, from which the defendant appealed.

If the error alleged on the part of the appellant is established by the testimony of the case, the legal consequence must be an avoidance of the contract : and it appears to us that the allegations made in the answer to this effect are supported by the evidence.

In a suit for the price of a tract of land sold, the defendant may successfully resist payment on account of error falling on the substance of thing sold.

The sale was made of a back concession which was to have been located in the rear of a plantation held by the

Where a back concession is authorized to be lo-

CASES IN THE SUPREME COURT

Western District.
September, 1890.

BERNARD'S
HEIRS,
vs.
BERNARD.

located in the rear of the ancestor's plantation; and in life-time of the latter, he and his son locates it in a more advantageous position. At the sale of the ancestors' succession the proces-verbal of sale purports to sell only the inchoate title or right to the concession—the son who purchases through an agent at the sale, will be considered as having purchased the located tract which is most advantageous to him, and not the right to locate it in rear of his ancestors' plantation.

And on being sued for the price of the purchase according to the proces-verbal of sale, he will be deemed to have purchased in error affecting the substance of the thing sold.

ancestor of the parties to the present action. He and his son the defendant in this suit, during the life time of the father caused the location to be made in another place. The proces-verbal of sale of the succession purports to sell the right acquired under the inchoate title to land in the rear of the plantation as designated in the *requête*.

But we have no doubt of the intention of the purchaser being to buy the tract which had been actually located. It was more convenient to his residence—its principal revenue consists in wood and timber. It was the understanding of one of the appraisers of the estate of Bernard the father, that this tract was by him appreciated. But it seems not to belong to the succession; and the vendor has consequently acquired no title under the adjudication to the property which he intends to purchase.

As to him there is error in the sale affecting the substance of the thing sold.

It is therefore ordered, adjudged and decreed, that the judgement of the District Court be avoided, annulled and reversed: and it is further ordered, adjudged and decreed, that judgement be here entered for the defendant, and appellant, with costs in both Courts.

MARK vs. THE CHURCH WARDENS OF ST.-MARTINVILLE.
APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE
JUDGE OF THE SIXTH PRESIDING.

When a cause is remanded to ascertain a question of fact, on an appeal from this judgment, if on an examination of the evidence sent up with the new record, there appears no error in the proceedings of the inferior judge, the judgment will be affirmed.

This suit is brought on an account exhibited by François Marc, nephew and heir of his deceased uncle, who was curate of the Roman Catholic Church of St. Martinsville, against the Church warden's to recover a sum of money al-

leged to have been advanced by the curate in his life time for the use and benefit of the church. The defendant made out an account for fees, for *interments* and other church services and privileges, which they alleged the curate had received on an account of the Church, and never accounted for them.

Western District.
September, 1880.

MARC
vs.
THE CHURCH
WARDENS OF ST
MARTINSVILLE.

The plaintiff denied that the curate was a salaried minister, but had a right to use all the *fees* received or coming to the Church for his services, without being bound to account for them.

The Court below decided that the *curate* was not a salaried officer, was not bound to account for the fees of the Church received by him; and that the *heir* had a right to recover the monies advanced by him for the use of the Church.

This case was argued on the facts by Mr. *Roman*, Mr. *Simon* and Mr. *Brownson* for the plaintiff.

Mr. *Bowen* appeared as sole Counsel for defendants.

Martin J. delivered the opinion of the Court.

This case was remanded from this Court with a view of determining a question of fact, on the solution of which we considered its final decision depended.

The judgment of the District Court was in favor of the plaintiff; and the defendants have again appealed.

We have given our best attention to the evidence which comes up with the record; and it does not appear to us the district judge erred.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

When a case is remanded to ascertain a question of fact, on an appeal from this judgment if on an examination of the evidence sent up with the new record, there appears no error in the proceedings of the inferior judge, the judgment will be affirmed.

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GUILBEAU'S HEIRS vs. CORNIER.

AGNES RODRIGUES—interpleader.

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CORNIER.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXT PRESIDING.

When an inventory of the property of the wife is made before marriage, expressly stipulating that the property or goods brought into marriage, are to be considered as the *bien propres* of the wife, such property will be considered as *paraphernal* and not *dotal*.

The wife has the right, at any time, during marriage, to present her claim and recover the amount of her paraphernal property against her husband, and resume its administration.

The heirs of L. Guilbeau brought suit against Michel Cornier for settlement and restitution of her half of the community formerly existing between them in her life-time; she being his first wife. Agnes Rodrigues, the second wife of Cornier, intervened and claimed the amount of property she brought into marriage as paraphernal, with mortgage on all her husband's property for its restitution.

This Court decided this case at its last term, and allowed a separation with the right in the wife to resume its administration as paraphernal. On the return of the case to the District Court, to ascertain the amount of her claim, she had judgment for \$5,948 75, which she had a right to claim as paraphernal property. The heirs of the first wife resisted her right to claim it as *paraphernal*, contending it was only *dotal*. The only question now to be decided is, is it a *paraphernal* or *dotal* property. The determination of this question depends on the legal construction of the following clause in the inventory by which she brought it into marriage.

The inventory is declared in the marriage contract between the second wife of Cornier to have been made :

"For the purpose of establishing before the celebration of her marriage, the property which she brings in, which said property mentioned in the aforesaid inventory, cannot be considered in any event, other than as property belonging to her individually, &c."

Simon for Plaintiffs. No express words are necessary to constitute or settle a *Dowry* on the wife; consequently the property in question is *dotal*. Under the new Civil Code there would be no difficulty. La. Code, Art. 2318, 2360.

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2. The act in question is certainly a *marriage contract* and comes within Art. 5, Page 325, of the old Civil Code. As such it must be governed by articles 16, 17 and 18 on page 326 of that code. The expression "*biens propres*," may mean *dotal* or *paraphernal*, or both. Old Code, 325, Art. 132. The Art. 1541, of the Napoleon Code is verbatim with article 17, page 317 of the old Civil Code, and by it the constitution *de dot* need not be express.

3. The property of the Interpleader is *dotal* and not *paraphernal*, and she cannot obtain a separation unless she prove her *dowry is in danger*, which she has failed to do.

Brownson for the Interpleader, *Rodrigues*. Contended that in order to constitute a dowry or dot, there must be express stipulation in the act constituting it. Civil Code, 324, Art. 12.

2. The inventory or act by which the Interpleader brought her property into marriage expressly states it to be hers individually. It is consequently *paraphernal*.

Matthews J. delivered the opinion of the Court. This cause was before the Supreme Court at its last term, and a judgment then rendered precludes the necessity of examining at this time, more than one question presented by the case now. See 8. Mar. N. S. 228.

The correctness of the decision from which the present appeal is taken, depends solely on a just interpretation of a contract entered into between the appellant and appellee previous to the celebration of their marriage. This act was preceded by an inventory of the intended wife's property, valued at 11,222 dollars, which is declared in the contract to have been made "*à l'effet de constater avant la célébration de son mariage les biens qu'elle apporte lorsque lesdits*

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When an inventory of the property of the wife is made before marriage, expressly stipulating that the property or goods brought into marriage, are to be considered as the *biens propres* of the wife, such property will be considered as *paraphernal*, and not dotal.

The wife has the right, at any time during marriage, to present her claim and recover the amount of her paraphernal property against her husband, and resume its administration.

biens mentionnés au susdit inventaire ne pourront être considérés dans aucun cas que comme des biens propres à elle appartenant &c." According to this clause of the contract, the counsel for the appellant contends that the property shown by the inventory, or its appraised value was constituted as a dowry or dot, and that under all the circumstances of the case, the husband ought not to be deprived of its administration. It appears, however, to this court that the true meaning of the words used in this part of the act excludes all idea of a constitution of dowry. On the contrary, it is expressly stipulated that the property or goods thus brought into marriage are to be considered as the "*biens propres*" of the wife; and, according to our laws must be considered as paraphernal; and if they be such, then she according to the doctrine laid down in the judgment in this case referred to has a right to claim them or their value from her husband at any time during the marriage, to be by her administered.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs, &c.

MELANCTON'S HEIRS vs. BROUSSARD & AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

An action of nullity cannot be instituted in the District Court, to set aside and annul a judgment of the Supreme Court.

The District Court cannot take jurisdiction and sustain an action of nullity to set aside one of its own judgments, after it has been passed upon by the Supreme Court, whether it be affirmed or not.

This suit was instituted the 2d of April, 1825, by the heirs and widow of Charles Melançon, deceased, against Pierre Broussard and Dr. John Duhamel to set aside and declare null and void a judgment of the Supreme Court, rendered in favor of said Broussard against Duhamel, in which Melançon's heirs were cited by Duhamel in warranty, which judgment is alleged to have been obtained by *fraud* and *collusion*.

The present plaintiffs instituted suit May 15, 1822, against Dr. John Duhamel and his security Joseph Latolais, in the parish of St. Martin, to recover \$3,085, it being the second instalment of the price of a tract of land, 5 arpents front with the depth of 40, 'purchased by Duhamel at the sale of Melançon's succession.

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Five days after the commencement of this suit, Pierre Broussard instituted a suit against Dr. Duhamel for three and a half arpents of this very land, which Duhamel had bought at the sale of Melançon's succession. Duhamel caused the heirs of the succession to be cited in warranty. They appeared—filed an answer—plead the general issue, and prescription of thirty, and ten years.

The five arpents' tract, now in dispute, for the second instalment of the purchase money of which Duhamel was also sued, had been originally the part of a forty arpents' tract belonging to the succession of one Le Dee, but had been partitioned out among several co-proprietors, among whom was Chas. Melançon, who had purchased of Le Dee's succession. One François Gonsoulin had been employed in 1799 to make this partition and division. He made out an exact plot and survey, marking all the lines between the co-proprietors.

Among other parcels of this division, the five arpent's tract, since sold at the sale of Melançon's succession to Dr. Duhamel, was included. This plot of survey contained a proces-verbal of the partition, and complete evidence of all the boundaries and lines of the several tracts into which the original one had been sub-divided. Pierre Broussard, also a co-proprietor of one of the tracts, with all the co-proprietors had assented to this proces-verbal of survey and partition in writing, by affixing their signatures. This book of survey containing complete evidence of all the boundaries between, and assented to by all the co-proprietors; was deposited with Gonsoulin. At the trial of the cause between

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Broussard and Duhamel and the present plaintiffs who were called in warranty, an attempt was made to procure this book of survey to prove the true boundaries between the parties. It could not be had. Gonsoulin was dead—his widow and heirs stated the book had been sent to New-Orleans, but could not recollect to whom. Melançon's heirs, who were defending for Duhamel, suspecting some fraud and concealment applied twice, but without success. They had to submit to a trial without this book or document, by which alone they could have proved the survey and boundary of the five arpent's tract, made to their ancestor with Broussard's consent. They however obtained judgment in the District Court, quieting Duhamel in his possession. But on an appeal to the Supreme Court, the judgment of the District Court was reversed, and Broussard succeeded in evicting Duhamel of three and a half arpens of the land he purchased of Melançon's succession.

The chief ground of reversal was "that it did not appear that the land of Le Dee (the original tract) was ever regularly and entirely *laid out and partitioned amongst all the purchasers.*" &c. This matter would have been completely explained by the production of the *last book of survey.*

The petitioners charge Broussard and Duhamel with *collusion* and *fraud*, and shew that suit was brought by Broussard against Duhamel with the consent and at the request of the latter, supposed to enable him to resist the payment of the last instalment of the price of the land; and also that Broussard's attorney agreed if he would permit the suit to be brought in his name, he would exempt him from the payment of fees and costs. The petitioners further charged fraud and collusion on Duhamel, Broussard and Gonsoulin's heirs in concealing and suppressing the *book of survey.*

The petitioners pray for the *annulment* of the judgment of the Supreme Court and for the restitution of the property,

Pierre Broussard answered by avering that the three and a half arpens of land were rightfully decreed to him by the Supreme Court denying all *fraud* and *collusion*. An order of Court was made, requiring the widow or heirs of Gonsoulin to produce the *lost* book of survey within *two* days. And soon afterwards, on the 26th. of January 1827, Pierre Broussard executed an act of *renunciation*, in which *he acknowledged the existence of Gonsoulin's book of survey; and that he examined it and found the partition with the lines of the several tracks marked and surveyed; and that he had signed and approved the proces-verbal of survey; and now to put an end to all difficulties, he renounced all advantage arising from the judgment against Duhamel and voluntarily consented that it be cancelled and annulled.*

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By this time, Duhamel was dead and his estate insolvent. The curator of his vacant succession, in answer to an amended petition of the plaintiffs, setting up the act of renunciation of Pierre Broussard, charged said act as *collusive* between Broussard and the petitioners, being obtained by threats and pecuniary aid. He also plead that the decree of the Supreme Court between Broussard and Duhamel was final, in as much as Duhamel was evicted and dispossessed of the land.

Joseph Latiolais, the security of Duhamel, in the purchase of the five arpents' tract, at the sale of Melançon's succession, now intervened. He charged *collusion* and *fraud*, in making the act of renunciation by Broussard—prayed that the judgment of the Supreme Court, which is attacked in this suit may *stand*, and that he be released from his security-ship in consequence thereof.

The District Court gave judgment for the plaintiffs *annulling* the judgment of the Supreme Court in favor of Broussard against Duhamel, as having been obtained thro' fraud and collusion: and also on the ground that Pierre

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Dumartrait the curator of Duhamel's vacant estate appealed.

Brownson & Bowen for plaintiffs.

Mr. *Brownson* submitted the following argument.

It is urged, that no action of nullity can be maintained in this case, because the judgment, sought to be annulled, was rendered in the Supreme Court : but that such suits must be brought before the tribunal which pronounced the judgment intended to be annulled—*Code of Practice Art. 608. 611 and 611.*

The present suit was commenced before the Code of Practice had been adopted ; but if it had not, it is conceived that this law does not impair the right to maintain such an action.—*Code of Practice, Art. 607.*

When the nullity is apparent on the record, it can be claimed on appeal.—*Ibid. Art. 609.*

Every judgment of this Court, when given on the merits, is such as the inferior tribunal ought to have rendered.

It is in fact considered for all effective purposes as the judgment of the inferior tribunal. It is pronounced on the facts certified by the lower Court, and then sent down to be investigated and executed as one of its own judgments.

To annul a judgment of this Court, a suit cannot be originated here, yet it is believed that one may be instituted in that Court, whose judgment this tribunal is required to pronounce. Let it be observed that the Code of Practice in giving a right to maintain such an action, states affirmatively and in general terms where it may be brought. The Code imposes no limitation upon the exercise of the right itself. On the contrary, it says generally that such an action *may be maintained* not to avoid or annul judgments of the District Court only, *but all judgments fraudulently obtained.*

In saying that the action of nullity may be demanded from the same court, which rendered the original judgment, it does not say that it may *not* be demanded in any case elsewhere. There is no very obvious reason for applying here the maxim *inclusio unius exclusio alterius*.

To attack a judgment procured by the fraudulent conduct of the party, tho' formally pronounced by this Court, implies no disrespect of its opinions. No good reason of justice or policy occurs to us for making this honorable tribunal the favored instrument to perpetuate fraud.

Under the *spanish* law, the reason for commencing such suits in the Court whose judgment was attacked applied as well to Courts of *Appellate*, as to those of *original* jurisdiction. The trial in the Appellate Court was had *de novo*. Feb. Ad. Part 2. Lib. 3. Cap. 1. sec. 13. No. 462. The right to institute such an action, was well understood in Spain. Ibid. No. 491.

The three following cases are specified:

"1º. Quando él que fué condenado en ella hallo *posteriormente* nuevos instrumentos; pues aunque sea mayor de 25 anos, puede pretender se rescinda por via de restitucion, la cual le compete para la *clausula general*, si qua mihi alia causa justa isse videbitur y debe diferirse a ella por la ignorancia y legitimo impedimento que tuvo para no haberles pro-
ducido."

"10º. Quando él que obtuvo la sentencia confiesa que es injusta, pues la prescension de derecho que tenia a su favor usa por su confesion."

11º. Quando se dio pruebas falsas de testigos o instrumentos, y no se alego ni canocio de su falsedad, en cuyo caso, el agraviado ha de pedir el mismo juez por via de restitucion, que rescinda su sentencia, citando a la parte contraria, lo cual debe hacerse prueba la falsedad en lo que forma, y para alegar y probarla, le concede la ley veinte anos y no mas."—
Vide also Gur. Phil. Sent. No. 12.

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When it is proper to bring the action in the superior and when in the inferior Court, will be seen on reference to the same title, No. 15.

In the case now before the Court, the party obtaining the first judgment, has renounced all the advantages resulting from it and specially consented in writing that it may be annulled.

The motive for this renunciation and agreement, is in substance that the judgment was unjustly obtained. We have seen that by the spanish law such a confession without any express agreement or renunciation, would be sufficient to authorise a claim of nullity. That law can be cited to shew that a party may not renounce a mere private advantage.

Has the District Court erred in carrying into effect the express agreement of the parties?

Simon and Mazureau for defendant.

This suit is brought to annul a judgment rendered by the Supreme Court, which judgment is reported in 3 Mar. N. S. 11.

1. The grounds of nullity are fraud and collusion between the plaintiff and Duhamel in the original suit, and the discovery of a document alledged to have been concealed by the parties. It was a principle of the spanish law that *sententia tenet nec rescinditur pretender instrumentorum posteor repertorum*.—Greg. Lopez.

2. The judgment of this Court, which is sought to be annulled, had reversed the judgment of the lower tribunal; so that the judgment attacked is not the judgment of the District Court, but the judgment of a Court of appellate jurisdiction.

3. The action of nullity cannot be maintained, as it ought to be brought before the same tribunal—the *same* Court which had *rendered it*. And as the Supreme Court has no original jurisdiction, there is absolute impossibility of attack.

ing its judgments by way of an action of nullity. The law was so under the spanish codes,—it is so under our Code. The present suit must be dismissed, and the judgment attacked allowed to have its full force and effect.—Partida 3. Lib. 22. Law 19.—Ley 6 and 8—tit. 17. Lib. 4. Recopilacion.—And Ley 4. Tit. 21. Lib. 4.—ibid. Ley 19 and 24. Tit. 9. Lib. 3. Recop. Code of Practice, Art. 608, 610 and 611.

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4. There are only two ways of annulling a judgment.

1. By taking an appeal. 2. When no appeal has been taken, by bringing an action of nullity before the *sans tribunal* which has rendered the judgment sought to be annulled.

5. If judgments could be otherwise annulled, there would be no certainty in judgments rendered by this Court. Actions of nullity would be often brought against them, if not with the hope of annulling them, they would be resorted to for the purpose of suspending execution and causing delay.

Martin J. delivered the opinion of the Court.

The defendants and appellants complain of the judgment of the District Court, which sustained an action of nullity against and actually set aside a judgment of this Court. They rely on the Code of Practice, Art. 608—which requires the action of nullity to be brought in the Court which rendered it, or the Court of Appeal before which the appeal from such a judgment was taken.

Hence it is urged that whenever a judgment has been appealed from, the Court which rendered it, is no longer competent to give a remedy on an action of nullity.—Code of Practice. Art. 611.

But the Appellee's Counsel urges that as this Court possesses no original jurisdiction, and is incapable of receiving any from the Legislature—its judgments may be attacked on the score of nullity, in the Court which rendered the judgment appealed from, whether affirmed or reversed by this Court.

An action of nullity cannot be instituted in the District Court, to set aside and annul a judgment of the Supreme Court.

The District Court cannot take jurisdiction and sustain

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an action of nullity
to set aside one of
its own judgments,
after it has been
passed upon by the
Supreme Court,
whether it be af-
firmed or reversed.

This appears to us a *non sequitur*. The Legislature has not given jurisdiction to the District Court, and it cannot assume it.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed : and the plaintiff's action dismissed—they paying costs in both courts.

TAYLOR & AL. vs. KNOX & AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

A sale of property by a debtor who has not sufficient means to pay all his debts, made to one set of creditors, will be considered in *fraud* of the rights of the remaining creditors, and will be annulled and set aside, though made in ignorance on the part of the vendees, as to approaching insolvency, and in all other respects executed with the utmost good faith.

The plaintiffs Ryan, Taylor and Evans were judgment creditors of one Thomas S. Saul, then cashier of the Branch Bank of Louisiana at Opelousas, to the amount of \$761 64. for amount of judgments obtained at the November term 1828, of the District Court of the Parish of St. Landry.

On the 1st. of October 1828, Saul being much indebted conveyed to the defendants W. G. Knox, Robert Rogers, Joseph Andrew, Robert Taylor, Geo. King, and William Simons, who were his securities as cashier of the bank, and which claimed a large sum from Saul and his securities, on account of an alleged *deficit* of said cashier, by authentic act, eleven slaves to indemnify his securities against any defalcation that might be recovered against them. The plaintiffs alledge that as they were creditors of Saul at the time this conveyance was made, it is fraudulent and void as to them, being made on the eve of bankruptcy, to secure one set of creditors to the prejudices of others. They pray that the sale may be declared fraudulent as to them, annulled and set aside, and the property seized and sold to satisfy their claims : or

that the defendants be condemned jointly and severally to pay the amount of their judgments against Saul. Western District.
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The defendants plead a general denial; and further, that they became the securities of Saul, as cashier of the bank at Opelousas, and as such, had been sued by the bank for an alleged deficit of said cashier to the amount of \$15,000 and that to secure them against loss as far as possible, in the event of a recovery against them by the bank, they had received the slaves in contest, and delivered over the proceeds to the bank on behalf of said sale. They denied that he was insolvent at the time of the sale to them, or since, and that they had no knowledge of any bankruptcy on his part.

~ ~ ~
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There was judgment for the plaintiffs—given in the alternative—to deliver up sufficient of the conveyed property, within 60 days, to satisfy the two judgments of the plaintiffs, amounting to \$533.55—and all interest and costs which had accrued: or that in default, they should jointly and severally be condemned to pay the same out of their own property.

It was clearly proved that Saul owed more debts than his property was sufficient to pay, on the 1st. of October 1828, when the sale and conveyance of the slaves in question was made to the defendants. He had never made a surrender of his property for the benefit of his creditors, but soon after the conveyance and sale aforesaid, absconded to avoid a criminal prosecution for embezzlement of the funds of the Bank. On this state of fact, the cause proceeded.

Lewis and Brownson for plaintiffs, made the following points to the Court—viz :

1 That a contract made by one creditor of a person in insolvent circumstances, which gives him a preference over the other creditors, is in law *fraudulent* and *void*.—L. Code 1965. 1981—83.

2. The property of the debtor is the common pledge of

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—La. Code. 1865. 1860 1861 1863. 4 Mar. N. S. 649.

2 ib. 61. session acts of 1817 p. 136 and 24.

3. The verdict of the jury being for the plaintiffs, the judgment must be that they recover of the defendants the *whole amount* of their debts, to be made out of the property fraudulently acquired from the debtor.—La. Code 1972.

4. That this Court will not set aside a verdict where the question is *fraud*, unless it be clearly contrary to *law* and *evidence*, which is not the case here.—5 Mar. N. S. 73—6 ibid. 337. 3 ibid. 155. 1. ibid. 177.

Bowen and *Simon* for the defendants.

1. Saul had property enough to pay all the debts he owed at the period of this sale to the defendants, except the alleged defalcation to the Bank ; and sufficient without the negroes, the sale of which was intended to make good the Bank deficit whenever it shall be ascertained. In this case Saul had a right to dispose of his property. La. Code, 1973—1979—1863. See also *West's* case, Mar. N. S.

2. The Bank being the one about to be benefitted by the sale of the negroes, should have been made a party to this suit.

Mathews J. delivered the opinion of the Court.

This is a suit instituted by some of the creditors of Thomas S. Saul, (whom they allege to be in insolvent circumstances) against the defendants for the purpose of causing to be set aside and annulled, a sale and transfer of certain property to them, as described in the act, on the ground of being in fraud of the rights of the plaintiffs.

The cause was submitted to a jury in the court below, who found a verdict for the plaintiffs, and judgment being therein rendered, the defendant appealed.

A sale of property
by a debtor who
has not sufficient

The action is founded on the article 1965 of the Louisiana Code and some subsequent articles. The judgment

of the District Court appears to us to be in pursuance of these laws; and the verdict of the jury not to contravene the testimony on which it is passed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs, &c.

EDGAR vs. SIMONS & AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

When a firm contracts with certain individuals for a letter of credit, upon which it receives advances of 4200 dollars, and agrees at the same time to put notes and accounts into the hands of these individuals to indemnify them against loss—they will hold the notes &c. thus pledged, against other creditors, although the firm is in failing circumstances, and the notes, &c. are not conveyed to the pledgees by authentic act, &c.

The plaintiff, William Edgar, instituted suit against William and John Simons on a bill of exchange for \$922, dated, Opelousas, January 11th., 1827—drawn by William Simons & Co. (the style of the firm at Opelousas) on John Simons & Co. in New-Orleans.—Both firms embracing the same persons, viz: Wm. & John Simons. The bill was payable in November, 1827, and February 1828.

On the 15th. of April, 1828, Wm. & John Simons being desirous of extending their business, applied to Geo. King, Wm. G. Knox, R. Rogers, and Joseph Andrews, and obtained a letter of credit from them to a mercantile house in New-Orleans, for \$5000.

The same day Wm. Simons executed the following obligation in consideration of the letter of credit:—

“Whereas Messrs. Joseph Andrew, William G. Knox, Robert Rogers and Geo. King have this day given me a letter of credit on New-Orleans for the sum of *five thousand dollars*: now to secure the payment of the same to the above named persons, in case of their being obliged to make any advance in consequence of said letter of credit, I do hereby engage and bind myself to deposit in their

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means to pay all his debts, made to one set of creditors, will be considered in fraud of the rights of the remaining creditors, and will be annulled and set aside, tho' made in ignorance on the part of the vendee, as to approaching insolvency, and in all other respects executed with the utmost good faith.

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hands, or in the hands of such person as may be named by them, *good notes* and accounts assigned to them as a pledge for the above amount of five thousand dollars."

(Signed)

"WILLIAM SIMONS."

The Messrs. Simons took up goods and merchandise to the amount of about \$4200 on the foregoing letter. And in pursuance of the above stipulation, notes and accounts to the amount of three or four thousand dollars were deposited, first in the hands of James Say, about the month of September and December, 1828, allowing to the Simons' the privilege of taking out particular notes and replacing them with others.

About this time, the Simons sold to John Rutherford all their stock of cattle and caused the said Rutherford to transfer to Joseph Andrews who was a *creditor*, a note of S. W. Wikoff for \$1287, and one on Wm. Wikoff for \$730 which notes were paid to the holder, Joseph Andrus, in May, 1829.

King, Andrews, Rogers and Knox were all made defendants to this suit with the Simons, and judgment prayed in *solido* against the Simons as the drawers of the bill of exchange sued on: and the transfer of the notes to the defendants, King, Andrews, Rogers & Knox, required to be declared *null* and *void* on account of *fraud*, and the proceeds applied to the payment of the plaintiff's demand—the Simons being now insolvent.

King and his co-defendants denied *all fraud*—declared that they knew nothing of the *anticipated* or *real insolvency* of W. and J. Simons admitted the deposit of the notes and accounts in the hands of James Ray for their benefit, and that they were deposited in pursuance of the written obligation of Wm. Simons to indemnify them against any advances they might have to make on account of the letter of credit they gave to Simons. They state "this letter of credit had been delivered to Thomson & Grant of New-Or-

leans, who on its *faith entered into acceptances for \$ 4000.*" Western District.
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They admitted that Simon had occasionally taken out some of the notes and accounts, deposited in the hands of Ray, but had put in others of equal value. That about the last of April 1829 they had a final settlement with Thomson & Grant gave their own notes in payment of Simons' debt.

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The notes and accounts were then taken from Ray and put into other hands for collection, to meet the notes of these defendants given in payment to Thomson and Grant.

It was in proof that in the Spring of 1829, Wm. Simons ceased to do business and spoke of going to New-Orleans to effect a compromise with his creditors: and at the May term 1829 several judgments were obtained against him in the District Court for the Parish of St. Landry, which remain unpaid; that they were unable to meet their engagements after the beginning of the year 1829.

In November 1829 they made a surrender of their property and applied for the benefit of the insolvent law.

On this state of facts generally the parties went to trial. There was judgment in favor of the defendants King, Andrews, Rogers and Knox—the Court being of opinion the plaintiff failed to establish the allegations (of fraud) in the petition.

Jayoso and Thompson for plaintiff—argued:

1 That the property of the debtor is the common pledge of his creditors.—La. Code. Art. 3150.

2. The law gives to every creditor a right of action to annul all contracts made to his prejudice.—La. Code, Art. 1965.

3. The act in virtue of which the defendants pretend to hold the notes and accounts transfered to them by Simons, can give them no privilege against those persons, *first*, because it is neither an authentic act, or act *under private signature recorded* in a notary's office at a time not suspicious.—La. Code. Art. 3126. 3 Mar. 572 5 Mar. N.S. 613 618.

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4. Because it contains no specific description of the things intended to be pledged. *ib.*

5. Altho' it purports to be a pledge of notes, they were not endorsed or assigned over as required by law.—La. Code, Art. 3128.

6 Because they did not remain in the possession of the pledgee, or of a person agreed on by the parties as required by law to confer a privilege. La. Code. Art 3129.

If it was intended as a pledge of notes or accounts, the notes and accounts still belong to the pledger, and should be returned to the mass, for pledge does not amount to alienation.—Art. 3133. 9 Mar. 524.

Lewis and *Bowen* for defendants. In arguing on the facts of this case made the following points—viz.

1. The contract between the two *Simons* and the defendants, *King* and others, was a fair and valid transaction, made at a time not suspicious.

2. That the parties to this contract or transaction were able and capable of contracting, and did contract.

3. There is no fraud in the contract between the parties, and consequently the Court cannot interfere with the just rights acquired by such a contract.

Martin J. delivered the opinion of the Court.

This is an action on a bill of exchange, in which *King* and others are made parties, as holders of certain notes and accounts alleged to have been fraudulently transferred to them by the original defendants since their insolvency.

King and his co-defendants admitted the notes and accounts had been transferred to them, but averred the transfer was a fair and legal one, in consequence of their having given the original defendants a letter of credit on which they became liable to pay and accordingly paid a large sum of money.

There was judgment against the plaintiff, and he appealed.

This action is brought against the original debtor and the individuals with whom he contracted, to set aside a contract of pledge on the score of fraud.—La. Code 1965.

The original debtor has, since the inception, made a cessation of his goods, and the suit as to him has been cumulated with the proceedings in the *Concurso*.

The District judge has been of opinion the plaintiff has failed to establish the fraud; and we do not see a *scintilla* of it in the evidence.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both Courts.

SHARP vs. KNOX.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. LANDRY.

When a plaintiff brings suit in the Court of Probates to recover property which is claimed by the defendant under a will, it will be dismissed for want of jurisdiction, as involving a question of titles to property, which the Probate Court cannot try.

The Court of ordinary jurisdiction, i. e. the District Court, can alone try questions of title, and a suit involving the right to property, claimed under a will and confirmatory act, must be brought in this Court.

This is a suit brought by the petitioner in the Probate Court, who alleges she is the mother of Eleonor O'Donagan deceased, late wife of Wm. G. Knox, who died on the 31st day of November 1829 leaving neither descendants nor ascendants, and that she is entitled to the succession of her deceased daughter.

The petitioner alleges her daughter died, leaving a large property in community with her husband Wm. G. Knox, besides paraphernal property to the amount of 2000 dollars. She further states that she is entitled to the successions of her two deceased sons, M & W. O'Donagan, who left an estate worth six thousand dollars, and that the said Knox took upon himself the administration of their successions, and has rendered no account.

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Where a firm contracts with certain individuals for a letter of credit, upon which it receives advances of 4200 dollars, and agrees at the same time to deposit notes and accounts into the hands of these individuals to indemnify them against loss—they will hold the notes &c. thus pledged, against other creditors, altho' the firm is in failing circumstances, and the notes, &c. pledged are not conveyed to the pledgees by authentic act, &c.

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The petitioner prays for an inventory to be made of the property in community between her deceased daughter and William G. Knox, and a judicial partition be made of it; and that the said Knox be made to account for the administration of the succession of her two deceased sons, and pay them over to her.

In supplemental petition, the plaintiff alleges that said William G. Knox claims all the estate of her deceased daughter, Eleanor O'Donogan, by virtue of an act purporting to be the last *will* and testament of said Eleanor, but which is alleged to be null and void:—1. Because it is not dated at any place. 2. That because the Notary who pretends to have drawn the act, does not state that he is of any particular Parish, or even of the State of Louisiana. 3. Because the witnesses are not stated to be domiciliated in any particular Parish or State. 4. Because the Notary does not say that he wrote the will as it was dictated. 5. Because he does not say that he read the will to the testatrix in presence of the witnesses. 6. Because no mention is made by the said Notary of the whole of the formalities having been fulfilled at one time, without interruption or turning aside the other acts. 7. During the whole of the day on which the said will purports to have been made, the said Eleonor was dying and consequently not in a state of mind to make a valid disposition of her property and will.

The petitioner further alleges she was induced by fraudulent and indelicate means, immediately after the death of her daughter, when her mind was in a phrenzied state, to sign a confirmatory act, for the purpose of curing the nullities in the said will of her daughter, and to allow said Knox the whole of her daughters' property. The confirmatory act she avers is null and void, as being obtained by fraud and surprise; and because it does not recite the nullities of the will.

She prays that both the will and confirmatory act be declared null and void and of no effect. Western District.
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The defendant Knox put in an exception to the jurisdiction of the Probate Court, because the suit is brought to try title to real property and receive the same from the defendant: that the District Court alone can take jurisdiction of such a case.

In answer to the merits, the defendant claimed the right to the whole of the succession of his deceased wife, in virtue of the aforesaid will, as ratified and confirmed by the plaintiff in two subsequent confirmatory acts.

The Court of Probates decided it had no jurisdiction of the cause, and dismissed the suit.

Gayoso for plaintiff; in support of the jurisdiction of the Probate Court—argued 1. That it had jurisdiction of this cause, because the suit being instituted to obtain a judicial partition of the property of a succession, in which case this Court has exclusive jurisdiction. Because the validity of the defendant's title to be enquired into, is founded on the validity of a will which has never been admitted to Probate, and consequently is a question most properly within the jurisdiction of the Probate Court,—*See Code of Practice*—Art. 922. 924 and 130. La. Code Art. 1637. 12 Mar.—234. 5 Mar. N. S. 50—217. 3 Mar. N. S. 473.

Lewis and Barry for defendant. By the plaintiff's own shewing, the defendant has title to the property of his deceased wife, and questions of title the Probate Court cannot try. 4 Mar. N. S. 77—485 509, 5 Mar. N. S. 9.—*Code of Practice*—Art. 924—N. 9. Art. 983.

The want of Probate of the will does not appear in the record. It is not to be seen in any part of the case. 3 Mar. N. S. 473.

Martin J. delivered the opinion of the Court.

The plaintiff, the mother of the defendant's deceased wife, who died without issue, claims a settlement of the

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estate in community between her daughter and the defendant; and the partition of the nett estate—and that the paraphernal estate of the deceased may be accounted for.

By a supplemental petition, the plaintiff prayed that a will and deed of confirmation of her deceased daughter, under which the defendant claims her estate may be set aside as improperly obtained.

The defendant pleaded to the jurisdiction of the Court, denying its authority to inquire into the validity of the title under which the defendant holds real property.

The plea to the jurisdiction was sustained, the suit dismissed, and the plaintiff appealed.

When a plaintiff brings suit in the Court of Probates to recover property which is claimed by the defendant under a will, it will be dismissed for want of jurisdiction, as involving a question of titles to property, which the Probate Court cannot try.

The Court of ordinary jurisdiction, i. e. the District Court, can alone try questions of title, and a suit involving the right to property, claimed under a will and confirmatory act, must be brought in this Court.

The petitioner herself shews that the defendant holds the property claimed from him under a will and confirmatory act which she seeks to set aside. This she cannot effect, except in a Court of ordinary jurisdiction, i. e. in the District Court.

The judge of the Court of Probates acted correctly in sustaining the plea to the jurisdiction:

It is therefore ordered, adjudged and decreed that the judgment be affirmed with costs.

HAGAN & AL. vs. BRENT.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

Where it is shown that the Attorney acknowledged the receipt of half the amount of a claim, by receiving a note from the party, payable in bank, and dismisses the suit instituted by him against another of the debtors under this claim for the balance, on the suggestion that the claim is settled, & the presumption is, that he has collected the whole debt and is accountable to the plaintiff for it, unless this presumption is destroyed by contrary proof.

The petitioners John Hagan and Thomas Mellon, merchants of New-Orleans, trading under the firm of Hagan and Mellon, claim in their petition of the defendant W. L. Brent,

\$1346.56 with 10 per cent interest from July 1. 1826, *Western District
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until paid.

They alledge that they forwarded to Wm. & J. Moore of Opelousas, a claim against Miles & Vaughan of St. Martin. The Moores handed the claim over to W. L. Brent Esqr. for collection, as an attorney at law who settled it, by taking two notes for \$624. 62 each, signed by S. Vaughan, R. Craw and J. Martin, payable the 20th of March and 20 of September 1819, with interest on each at the rate of 10 per cent from their dates until paid. The petitioners charge the defendant with having collected the proceeds of these notes and refusing to pay over, except the sum of \$500.

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Brent in his answer after a general denial, says he paid over to the plaintiffs all the funds he ever collected on the notes and accounts sued on, except his fee of \$124, being 10 per cent on the amount settled by taking new notes.

The testimony of W. Moore shews that the first note of \$624 62, was collected by the firm of W. & J. Moore, and credited in their books to the plaintiffs; and that the second note was sent to the plaintiffs in New-Orleans, and by them sent back to Wm. L. Brent, Esq. at St. Martinsville, for collection. He instituted suit in 1820 against J. Martin, one of the joint obligors, and in his petition admits a payment made on the note of \$352. 62 by R. Craw, another of the joint obligors: there is also a receipt for this amount endorsed on the note and signed "Wm. L. Brent, for Hagan & Mallon," dated, March 16, 1820. This receipt is alledged to have been crossed out, in the hand writing of Mr. Brent. But the suit was brought by the defendant against Martin for the balance only, after deducting the amount of this receipt, the balance being for his portion, Vaughan being insolvent. Craw, it seems from the evidence, obtained his credit for the payment of the \$352. 62, by giving a note for it in bank. At the April term, 1822, the suit against Martin was dismissed as having been settled.

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The District Court charged the defendant with the whole amount of the note put into his hands for collection, and after allowing him some small credits, gave judgment against him for \$616. 82, with interest at five per cent, from the 26th of April, 1890, until paid.

Mr. Bowen for the plaintiff, argued from the facts of the case, the liability of the defendant for the note put into his hands for collection.

Mr. Brent, by brief, in *propria persona*, and Mr. Simon contended that it was not shewn by the evidence that the defendant had retained any of the money collected.—That it was not shewn that Craw's note was ever paid, and the dismissal of the suit against Martin did not prove the defendant received the amount of the note sued on.

Mathew J. delivered the opinion of the Court.

This suit is prosecuted by the plaintiffs to recover from the defendants a certain sum of money, as having been collected for them by the latter, in his capacity as Attorney at Law, &c.

The claim is made for the sum of \$1346. 56—one half of which seems by the evidence to have been paid over by the plaintiffs, who recovered a judgment for the balance in the Court below, from which the defendant appealed.

Where it is shown that the attorney acknowledged the receipt of half the amount of a claim, by receiving a note from the party payable in bank, and dismisses the suit instituted by him against another of the debtors under this claim for the balance, on the suggestion that the claim is settled, & the presumption is that he had collected the whole debt and is account-

It is shewn by the testimony of the case, that the Attorney after receiving the evidences of the plaintiffs' claim for the whole sum as above stated, transacted in relation thereto so as to take two notes of equal amount for the benefit of his clients, payable at different times.—The proceeds of one of these notes was paid or accounted for to them. The other was placed in the hands of the Attorney for collection, who acknowledged the receipt of half the amount endorsed on its back, as being paid by a note made payable in the bank. He afterwards brought suit for the balance of the original note, which suit, on suggestion of settlement was dismissed at the costs of the defendant. It is true that the record af-

fords no particular proof that the Attorney collected either of these sums. But the facts disclosed by the evidence, raise a strong presumption that he did, which can only be destroyed by contrary proof.

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He has not accounted for the note payable in bank, taken by him; nor is there any account rendered of the manner in which the suit was settled, or of the disposition of the money which ought to have been received by the plaintiff's Attorney on said settlement.

table to the plaintiff for it, unless this presumption is destroyed by contrary proof.

The decision of the cause turns on matter of fact, and we are of opinion that there is no error in the judgment of the District Court.

It is therefore ordered, adjudged and decreed that the judgment be affirmed with costs in both Courts.

DUGAT vs. MARKHAM & AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

In all cases when the husband and wife are not separated from *bed and board*, in law, the domicile of the wife is to be considered as that of her husband, and service of citation is good as to the wife, when left at the domicile of the husband, although she resides in a different Parish, when they are sued jointly.

Where no answer has been filed, a judgment by default must be taken before any final judgment can be rendered, and if final judgment be rendered without this formality, it carries with it a vice or a defect for which it may be annulled.

But altho' the husband must in all cases, unless he refuses, and then the Judge, authorise the wife to *sue* and be *sued*, yet the husband has no right to *appear and file an answer* for the wife without her consent, where she lives separately in property, and is sued jointly with her husband.

This is an action of nullity to annul and set aside a judgment of the District Court, rendered against the present plaintiff, for alledged defects in service of citation and appearance by her husband, and filing answer for her without her consent or authority—and for various other defects and informalities. It commences by injunction against Hathern's judgment.

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On the 29 of August 1826, D. K. Markham, attorney at law, and Anne Dugat, widow of the late Marin Martin, of the Parish of Lafayette, signed articles of marriage contract, stipulating that no community of property should exist, and that each one should administer their own effects, separately and independently of each other. The second article provided as follows. viz :

The future wife, in consequence of her having reserved to herself the sole administration of her property, *is to support the entire charges of matrimony.*

The marriage between the contracting spouses was consummated the same day, and they both went to reside on the plantation of the wife in the Parish of Lafayette. In the Summer of 1828, while the crop was in cultivation (the husband Markham superintending the hands and working with them) the negroes rebelled against his authority, and were encouraged and instigated to do so, by the wife's children, who had become exceedingly hostile to Markham. Until then, it appears he had lived in harmony with his wife. But the disaffection in the family soon extended to the wife, and on the 20th of August 1828, Markham was compelled to leave the plantation. He went into the village, commenced boarding with Wm. Hathern, who kept a tavern, and resumed his profession. The wife ever afterwards refused to live with him. On the 20th April 1829, Markham regularly advertised his domicile in the Parish of St. Landry, and took up his residence in the town of Opelousas; boarded at a public tavern and rented a small house for a law-office. He made various overtures to his wife, to bring about a reconciliation and invited her to follow him and reside at his new domicile. She declined all.

Wm. Hathern instituted suit against Markham and wife, in the parish of St. Landry, at the May term 1829 for the amount of Markham's boarding account and tavern bill, amounting to \$305. 50, while living with him, and obtained

judgment against *both* for \$283.75 with interest and cost. The petition prayed that Markham and *wife* be both cited to appear and be condemned *jointly* and severally to pay the amount of the claim. Citation were left at Markham's new domicile in Opelousas for himself and *wife*.—Markham appeared and answered in Court to the petition for himself and *wife*. Both were sued as residents of the Parish of St. Landry, when in fact the wife never left her residence in the Parish of Lafayette. The wife was made liable for the debt of the husband under the clause of the marriage contract, by which she binds herself to *support the entire charges of matrimony*.

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A *fi fa* issued on this Judgment and was levied on the property of Mrs. Markham (Anne Dugat) in the Parish of Lafayette, who on the 5th of September 1899, presented her petition and obtained an injunction against the execution staying any further proceedings thereon.

She alleges that she has never been *legally cited* and was not bound to appear and answer to the judgment of Hathern; that altho' her husband had removed to another Parish she was not bound to follow him, because he had not provided a suitable domicile for her. She denies that her husband had any authority to *appear and answer* for her to the suit of Hathern—that not being legally *cited* she consequently had no legal notice of the suit, and judgment could not be legally given against her.

She further alleges, she is not bound under the 2d clause of the marriage contract, in which she engages to support *all the charges of matrimony*, to pay *all* such debts as her husband may contract; but only to an amount not exceeding *her annual income* from her property; and invokes the protection of the laws against any sum beyond this. She prays that Hathern and Markham be cited, and that the judgment rendered against her and her husband be *annulled and set aside*, and the decree annulling the same be rendered

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contradictorily with her husband, who had no authority to appear and answer for her. She further prays that the amount she is to pay for the charges of matrimony be definitively fixed, to serve as a rule and guide to her hereafter.

Markham and Hathern appeared and filed separate exceptions to the plaintiff's petition.

D. K. Markham excepts and prays the petition may be *abated*.

1. That there is no law permitting a married woman to bring such an action as this, against her husband.

2. That Wm. Hathern is illegally joined with him, which deprives him of Hathern's testimony, whose interest is adverse to his.

3. The petition and citation do not set forth the domicile of this defendant.

4. That plaintiff has falsely set forth her own place of domicil, it being in the Parish of St. Landry and not Lafayette.

5. That the plaintiff has not set out a sufficient cause of action.

6. The petition does not state the place of residence or where defendant lives.

7. The petition does not contain a clear and precise statement of the object of demand, or such demand as a married woman may make judicially upon her husband.

Hathern, excepted—1. That his domicil is in a different parish from the one in which the suit is brought.

2. That he is a judgment creditor of plaintiff and she has shown no legal cause to have his judgment annulled.

3. That the plaintiff has improperly joined in this suit, causes of action which are separate and distinct, by making her husband his co-defendant in this suit, whose interest is opposed to his.

4. That his judgment against the present plaintiff, remains unappealed from, unanswered, and definitive, and forms *res judicata*.

The District Court by its judgment sustained the foregoing exceptions—dissolved the injunction and gave judgment against the plaintiff for all the costs of suit.

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Simon for plaintiff. The judgment of Hathern ought to be annulled, and the injunction made perpetual.

1. Because Markham had no authority to appear and file an answer for his wife.

2. There is a stipulation in the marriage contract by which the spouses are to live separated in property—each administering his own: but the wife paying the *charges of matrimony*: so that Hathern's claim arises out of the wife's obligation, and relates to her separate interest over which the husband has no control; it being only necessary to sue him with her to enable her to defend. Code of Prac. Art. 118.

3. The right of the husband to appear and defend for the wife, is only given when her property is *under his administration*. In this case her interest is in direct opposition to his—the act of her husband gave rise to the claim set up against her; in which she has not only to contend against the creditor, but against her husband, and to dispute the act of her husband for which she is sought to be made liable. Code of Prac. Art: 107,

4. No judgment having been taken by default, and no legal appearance made by the defendant, she ought not to be bound by it. It should be annulled.

Lewis & Brownson for Markham. The plaintiff's claim for damages cannot be sustained, because in the suit against Markham and wife, the husband alone had the right to defend. Code of Prac. 106—7—8. 118. Louisa. Code 126.

2. If the property of the wife be dotal as set forth by her, in that case, her husband alone had the right to appear for her in the suit. La. Code. 2330.

3. D. K. Markham being an Attorney at Law, his authority to appear for his wife will be presumed. 8 Mar. N. S.. 232.

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4. The wife being notified by her husband that he had appeared and answered for her—her silence will be construed as tacitly consenting to it: and the decision of the Court refusing Markham to withdraw the answer, forms *res judicata*, being unappealed from.

5. The prayer for the Court to apportion her revenues and say *how far* she is to be bound to support the charges of matrimony cannot be enquired into here, the original judgment not being appealed from.

6. The correctness of a judicial decision can only be enquired into by—1. Appeal. 2. Direct action of nullity against the judgment creditor. 3. By rescision.

Bowen for Hathern. The judgment is regular—having been obtained against Markham and wife *in solido*, who were both sued in the Parish to which the husband had changed his domicile according to law—the domicile of the husband being that of the wife. La. Code. 42, 43, 44, 48, 122. Code of Pr. Art. 162.

2. Appearance and pleading to the merits, cure all defects and waive a plea to the jurisdiction. 1. Mar. N. S. 201. 1 Toul. 88, No. 103. 105.

3. The husband is authorised by law, to appear and put in a plea or answer for his wife. La. Code. 2330. Code of Pr. 104. 107.

4. As to Hathern the plaintiff cannot maintain this suit, because she and Markham are condemned *in solido*, each one for the whole debt—and this judgment is in force, unappealed from, therefore it forms *res judicata*, between the parties.

5. This suit is neither an *appeal* from Hathern's judgment, nor an *action of nullity* for any of the causes known to the law—consequently it cannot be maintained. Code of Pr. Art. 605.

Mathews J. delivered the opinion of the Court.

In this case the plaintiff instituted her action to cause a judgment to be annulled, which had previously been obtained

against her by the defendant Hathern : and to stay proceedings on an execution which had been awarded on said judgment. The Court below gave judgment against her from which she appealed &c.

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The material facts exhibited by the record are as follows: previous to the intermarriage of Markham and the plaintiff, they entered into a contract in which amongst other things it was stipulated that there should exist a separation of property between the contracting parties : the future wife taking on herself to support *entirely* the necessary expenses of their household. They lived in harmony for some time, but in consequence of the interference of her children of a former marriage, she was induced to treat her husband in such a manner as to render it impossible for him longer to remain in her house. In truth she seems to have turned him out, to shift for himself. Under these circumstances he went to board with the defendant Hathern, who was plaintiff, in the original suit (wherein he obtained the judgment now complained of) both against the husband and wife *in solido*.

Before the commencement of that action Markham had established his domicile in the Parish of St. Landry—his wife still residing in that of Lafayette. The service of citations both on the husband and wife were made at the domicile of the former ; and he filed an answer for *himself*, and one for his wife separately.

The first question of Law arising out of these facts relates to the legality of the service of citation on the wife, and depends for its solution on her domicile. When married persons are not separated from bed and board, the domicile of the wife, is by law that of the husband—See La. Code Art. 48.

The course of legal proceedings, as prescribed by the Code of Practice, requires, that against a defendant who has been properly cited and does not answer within the delays allowed, a judgment by default must be taken before any final judgment can be rendered. And if final judgment be

In all cases when the husband and wife is not separated from *bed and board*, in law, the domicile of the wife is to be considered as that of her husband, and service of citation is good as to the wife, when left at the domicile of the husband, although she resides in a different Parish, when they are sued jointly. Where no answer

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has been filed, a judgment by default must be taken before any final judgment can be rendered, and if final judgment be rendered without this formality it carries with it a vice or defect for which it may be annulled.

But although the husband must in all cases, unless he refuses, & then the Judge authorise the wife to sue and be sued, yet the husband has no right to appear & file an answer for the wife without her consent, where she lives separate in property, and is sued jointly with her husband.

rendered without this formality, it carries with it a vice or defect for which it may be annulled—See Code of Practice. Art. 606—No. 4.

A second question occurs in this case, and that is to ascertain whether any answer was filed, legally binding on Mrs. Markham, in the case of Hathern against her and her husband?

In that suit the plaintiff attempted to make her liable for the board of her husband, under the stipulation in the marriage contract by which she undertook to defray the matrimonial expenses. It is in reality a suit, against a married woman for a cause of action relative to her own separate interest, considered in relation to the wife in the present instance : and was properly brought both against her and her husband, who was bound to authorise, and assist her in defending it—See Code of Practice. Art. 118.

But she must be viewed in this respect as a distinct and separate defendant, who could only appear and answer by herself, or some person duly authorised by her for that purpose, so as to be concluded by such answer. The husband tho' bound to authorise his wife to defend, and to assist her in her defence, cannot, in his capacity as such, assume the whole management of the cause in such a manner as to bind the wife, without her authorisation. If Markham had appeared in his capacity of attorney at law, and no objections made at the time of answering, or before final judgment; the plaintiff, in this suit of nullity and injunction, would possibly have been stopped from alleging want of authority, &c.

As husband, the same effect does not attach to his act in answering for her, as that was not a duty imposed on him, by law or as attorney for his wife.

It is however strenuously urged by the counsel for Hathern that Markham, in consequence of his capacity as husband, has complete control over the personal and possessory actions of his wife, and in support of this doctrine, the article 107 of the Code of Practice is relied on, which is ex-

pressed in these terms : "Husbands have under their control the personal and possessory actions to which their wives are intitled &c : therefore they can proceed judicially, and in their own name, in whatever relates to the preservation of their dotal property &c., as well as to the recovery of the debts due them, *these* being under their administration." In the French text—"qui tombent sous leur administration."

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According to the whole context of this article, we think that it relates solely to those claims and rights of action belonging to a wife, of which the husband has the sole management arising either out of matters appertaining to the dowry or paraphernal property, which he administers either by express or tacit consent on her part. In situations where separations of goods exist as in the present, the fair presumption is that each one of the married persons administers his or her separate property; and altho' a wife, not separated from *bed and board*, can in no case appear in a Court of Justice without the authorisation of her husband, or that of some competent power, on his refusal; yet when she does appear, either as plaintiff or defendant, she may prosecute or defend according to the dictates of her own judgment in matters relating exclusively to her own interest. And her husband is not privileged *de jure* to assume the sole and exclusive management of her suits either as plaintiff or defendant. To authorise and assist, are functions distinct from absolute control. The present instance shows that cases may arise in which the interest of the husband and wife may be opposed to each other.

This suit is founded on a debt contracted by the husband in which the plaintiff attempts to make the wife liable.— Their interests are opposed, and he surely cannot be viewed as a proper person to defend her.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be reversed, avoided and annulled ; and it is further ordered, adjudged and decreed

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that the injunction heretofore granted be reinstated and made perpetual : and the judgment of Hathern against the plaintiff and appellant be declared null and void—reserving to the defendant and appellee Hathern, his right to pursue the appellant in legal form, for the recovery of the sums of money claimed by him from her as being bound to pay for the board and expenses occasioned by her husband &c. the appellee Hathern to pay the cost of this appeal.

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CHACHERÉ vs. DUMARTRAIT &c.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL
DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

A donation of immovable property may be made, and stand good against creditors, where the father put his daughter and her husband in possession of land, which was afterwards sold and the price received by the husband of the daughter and the sale ratified by the father.

2. In this case the price of the land, sold will be considered as due to the father, but as received by the son-in-law as a donation or marriage portion to the daughter which is as completely effected, as if delivered from the father to the daughter.

This is an injunction suit, instituted by the wife, against the syndic of the creditors of her insolvent husband, B. Martel to restrain him from selling the immovable property and slaves of the insolvent, until her claim for property and money brought into marriage is first satisfied by a sale for cash. She backs her claim by a tacit mortgage on the property of her husband.

It appears from the evidence that some time after the marriage of the petitioner to B. Martel, on or about the year 1816, her father Louis Chacheré, allowed her husband to sell two tracts of land, situated on the Carancro and in the Parish of St. Landry, to one William Johnson, for \$1600, and to receive the price. The title to Johnson was ratified and confirmed by L. Chacheré the father of Madame Martel. The wife alleges this land was a donation from her father, to her, though sold by her husband. Madame Boutté her

sister testifies that Louis Chacheré père purchased the land since sold by Martel to Johnson, for his daughter, Madame Martel to live on. And that Martel and his wife did live on it a year or more. Mr. Boutté, a brother-in-law of the plaintiff, states it was always understood in the family that the land on the Caranero, "sold to Johnson," belonged to "Madame Martel." That Martel, first moved to Vermillionville after selling the land.

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The wife now claimed in her petition of injunction, the price of the land, with a legal mortgage on the immovable property of her husband and slaves, for its payment, and to have so much of the property in the hands of Dumartrait the syndic, sold for cash as will satisfy this claim, together with others, for sundry other articles of furniture and property brought by her into marriage.

She had judgment for \$1950, with legal mortgage on the real property and slaves of her husband for \$1600, the amount of the sale of the two tracts of land, received as a donation from her father—to be paid in preference to the other creditors &c.

The main point of contest in the cause is the lien of the wife upon the husband's property, for the price of the two tracts of land sold by the latter. The sale of the two tracts was passed in June and July 1815, in the name of B. Martel to Wm. Johnston—and in March 1817, Louis Chacheré père ratified and conferred the said sale to Johnson. It was urged this property never came into the possession or ownership of the wife, who could of course have no privilege or lien upon it or its price.

Bona for plaintiff. The wife claims the price of two tracts of land sold by her husband as the price of paraphernal property. A donation may be made by *parol*, when the father, (the donor) makes declarations of giving certain specified property to his daughter, and puts her and her husband in possession—and the husband sells and receives the price of the said property, which sale is ratified by the father.

Western District. 5 Toullier 178. 172. ib. 181. Quest : de Droit §6. Nov. September, 1830. Rep. §2.

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2. As between the creditors and the wife of the insolvent, her claim being for paraphernal property must be preferred, and the price paid out of the proceeds of the insolvents, in preference to other creditors whose mortgage does not precede it.

Simon for defendant. The only evidence of the donation of \$1600, the proceeds of the two tracts of land, comes from two of the plaintiff's co-heirs, who declare to have heard their father say at different times, B. Martel had received it for his wife. This evidence comes up subject to legal objections. This is no evidence of the donation of the land. Old Civil Code. 221. Art. 53.

2. It is true that a donation of a sum of money may be made verbally when it is *de manu ad manum*, but it must be proved by legal evidence. In this case there is none but hearsay and this from an incompetent witness. The father could not give evidence if he were living. Old Civil Code 313. Art. 248.

3. The husband's confession could not have been given in evidence—so as to have effect against creditors here represented by their syndic. 7 Mar N. S. 460. 8 Mar. N. S. 459.

Mathews J. delivered the opinion of the Court. In this case the husband made a cession of his goods to his creditors. His wife claimed to be placed on his bilan as a creditor with a right of tacit or legal mortgage to the amount of \$1900. The Court below admitted her as a creditor for the whole amount claimed, but restricted her mortgage to the sum of \$1600 : and from the judgment thus rendered the syndic, on behalf of the mass of creditors appealed.

The \$1600 for which the legal mortgage was accorded, to the wife, seem to have been considered as a donation made to her by her father, which fell into the hands of her husband, the insolvent, and was by him appropriated to his own use.

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The donation appears to have been made in the following manner : Chacheré the father, was the owner of certain tracts of land of which he permitted the husband of his daughter to take possession and occupy for some time, who afterwards sold this property to one Johnson for \$1600, which was paid (on Chacheré's ratification and confirmation of sale) to his son-in-law. From the whole tenor of the evidence we do not doubt the intention of the father to give these tracts of land to his daughter as a marriage portion : but before any legal transfer was made to that effect, her husband was permitted to make the sale as above stated.

A donation of immoveable property may be made, and stand good against creditors, where the father put his daughter and her husband in possession of land, which was afterwards sold and the price received by the husband of the daughter and the sale ratified by the father.

In this case the price of the land sold will be considered as due to the father, but as received by the son-in-law as a donation or marriage portion to the daughter, which is as completely effected, as if delivered from the father to the daughter.

The price, although paid to him by the vendee must be considered as really due to the owner of the property, Chacheré the father ; and was left in the possession of the receiver as a donation to his wife, he received it as her agent, delivered from her father through the agency of the vendee of the land, who was really a purchaser from Chacheré, altho' nominally from Martel. The donation was thus fully and completely effected. It was as fully executed as if the money had been delivered from the father to his daughter and by the latter transferred to her husband. If it was of moveable or personal property and was executed, it is good according to law. See La. Code, Art. 1528.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with cost.

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APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

One notoriously acting as sheriff may rightfully be entrusted with the collection of the Parish taxes, whether he be sheriff *de jure* or not and his sureties are bound for the faithful performance of his trust.

Sureties who sign a sheriff bond, thereby acknowledge him as sheriff *de facto*, and cannot, for any informality or defect in his appointment be permitted to deny the capacity of their principal thus recognized.

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No legal mortgage exists in behalf of the State, or the Parish on the property of its collecting officers since the adoption of the Louisiana Code in 1825.

The Parish loses none of its rights against the sureties of its collecting officers, by not enjoining an execution of the State issued against such officers, for arrearages of State taxes.

Parol testimony is inadmissible to shew that another person was to have signed a surety bond, in addition, when the bond itself does not shew the facts, or admit such an inference.

Indulgence given by not suing the principal will not exonerate the sureties, unaccompanied by an express grant of time.

By order of the Police Jury, the Treasurer of the Parish of St. Landry instituted suit against Benjamin S. Haw, late sheriff of said Parish, and his securities Joseph Andres, Luke Lessassier, Eloi Landry and Alexander Robb, on their bond for the amount of the Parish taxes, due for the year 1827, amounting to \$3,190. 69, which it was alleged the sheriff had received and failed to pay over to the Parish Treasurer.

Haw, executed a bond the 2d February 1827, conditioned for the faithful performance of this trust, with the above gentlemen as his sureties. The condition of the bond was alleged to be violated and broken and judgment *in solido* against the sureties for the penalty, demanded, with interest and cost.

The securities in their answer deny their liability under the bond.

1. Because the Sheriff was not authorised to collect the taxes of that year, he not having complied with the formalities of the law, by producing the Treasurers receipt for the payment of the taxes of the preceding year, before renewing his bond.


2. That he never took the oaths of office required by law and consequently was not the legal sheriff, nor the collector of the taxes of the Parish.

3. The securities alleged they signed the bond in good faith and were in utter ignorance that these formalities were not complied with.

4. That the bond was not recorded in due time, to give it force and effect as a lien, privilege, or mortgage, by which

neglect, *they* as sureties by the 3030 Article of the New Civil Code on paying the debt of the principal, have lost their right to be subrogated to all the rights, mortgages and privileges of the creditor.

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5. Since the date of the bond, Haw, the principal in it, has disposed of a considerable amount of property, then owned and possessed by him, the lien on which is now entirely lost and cannot operate in favor of the sureties, who may be compelled to pay the debt claimed in the petition by reason of the neglect of the Parish to have the said bond recorded in due time. The bond is therefore *void*.

6. That the Treasurer of the State had levied an execution on all Haw's real property and slaves, for the taxes due the state for the year 1826, for which year the Sheriff, Haw gave no bond, and had proceeded to sell the same and apply the proceeds to the deficit of state taxes for that year: and had the bond signed by their securities and now sued, on been recorded in time it would have operated as lien on the property in their favor.

7. The bond is not binding on the sureties because it was never accepted and approved by the board of magistrates as is required by law.

8. That it was understood when these securities signed, there was a blank left to insert the name of Wm. Haslett, who was also to sign as one of the sureties, but which he never did.

9. The police jury of the Parish prolonged the time of paying over the Parish taxes, and neglected to sue the sheriff when they became due and were not paid up; in consequence of such prolongation and neglect the sureties ought to be exonerated.

The defendants pray the bond may be set aside, cancelled and annulled, and they discharged from liability &c.

On the trial the plaintiff offered in evidence the certificate of the Parish Judge "for the purpose of proving that a meeting of magistrates was held in conformity to law for the approval of the sheriff's bond"—which was objected to and

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a bill of exceptions taken, on the ground that it was not the best evidence the case afforded. That the book of records containing the proceedings of the meeting of the magistrates when called, was better evidence, and the defendants offered to produce it.

2. The defendants offered to prove by parol evidence that the bond sued on, was signed in blank, and given to Haw, the Sheriff, to procure the signature of Wm. Haslett, who it was agreed, with these defendants; was also to sign with them. The evidence was objected to by the plaintiff, as going to prove something beyond the bond &c. and a bill of exceptions taken.

Judge King, the Parish Judge of the Parish of St. Landry, testifies, that the bond of Haw, and his securities, sued on, was taken, February 2d 1827 and deposited in his office to be recorded on the 12th of the same month; but was not actually inscribed on his record books, for some months afterwards. But it is also his custom to consider all instruments as of record, from the time they were deposited and put on the files, in his office, and not from the time when they are inscribed in the record books.

The deficit of Haw, occasioned by his failure to pay over the Parish taxes for the year 1827 was fully made out by proof.

There was judgment against the securities *in solido* for \$3190. 69 with interest and cost.

Levis for plaintiff; argued on the following grounds:

The certificate of the Parish Judge is good evidence to prove the *meeting* of the magistrates for the purpose of accepting the sheriff's bond, there being no records of the proceedings of the magistrates; none being necessary—parol testimony is good to support the Parish Judges' certificate. 3 Mar. N. S. 589 93.

2. Parol evidence to show that the bond was delivered to Haw in blank to procure the signatures of his securities was properly rejected, as going to prove something beyond or

in contradiction of a written instrument. La. Code 2256, 1791, 2233, 3 Starkie Ev. 994—5. 998, 1001, note (r) 1002, note (e) 1005, 1006.

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3. The bond sued on was voluntarily executed by defendants who were capable of contracting—none but a legal defect or excuse can avoid it. In whatever manner a person binds himself he shall remain bound. Nov. Recop. Lib. 10 Tit. 1: Ley 1 : 2 Mar. N. S. 681. 3 Mar. 569.: Febrero Ad. Part. 1. Cap. 7. § 5. P. 97 to 105. No. 122 to 128. 1 Porthien on Ob. No. 56. Code Nap. Art. 1120. Mar. Dig. 544.

4. Haw was commissioned as Sheriff, took the oath, and gave bond for the faithful execution of the duties of the office which was sufficient for the Parish to confide the collection of its taxes to him.

But the sureties are stopped from alleging that he was not Sheriff, by signing the bond which states and admits he was Sheriff. 2 Mar. N. S. 672.

5. The magistrates Court accepted the security offered by Haw. But here again the securities are stopped from alleging that he was not Sheriff, by executing the bond. No formal or record evidence is necessary to the acceptance of the bond. 12 Wheaton 64. 3 Mar N. S. 589.

6. That Haw was appointed collector of the parish taxes by a resolution of the 4th of December 1826—and is by law *ex officio* collector of the Parish taxes until another is appointed. Acts of 1813. P. 142. § 1.

7. When sureties are not placed in a worse condition by the acts of the creditor they cannot complain : and as the plaintiff had no right of mortgage, they could not subrogate the sureties to one—to all other rights they have a subrogation by operation of law. La. Code Art. 3280. 8 Mar. N. S. 243.

8. In this case the securities are bound *in solido* ; and as to the creditors are *absolutely principals*—and can claim none of the privileges allowed to simple sureties. Civil

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Code. 428. Art. 7. La. Code 3014. 9069. Febrero Part. 1.
Cap. 1. § 5. No. 126.

9. Judicial sureties cannot demand the plea of discussion, which is allowed to simple sureties. La. Code. 3035. 1 Mar. N. S. 478. 11 ib. 434.

10. Even when the surety is bound by a more onerous condition than the principal, the obligation is not *void*, but only *reducible*. La. Code 3006.

11. The Sheriff's bond was *recorded* in legal acceptance. 1 Cranch 161.

12. The plaintiffs were not bound to enjoin the state executions against Haw, nor required to sue him sooner than they did—the taxes not being due until June 1828, and suit was brought at the next court. Acts 1813, P. 232. §. 13. 8 Mar. N. S. 243. 11 Wheaton 184. 9 ib. 730.

13. The fact that Haslett was to have signed with the other sureties does not appear, and if it did, the act of the others in signing without him will bind them. See authorities cited under 2 head.

Brownson, Bowen and Gayoso argued contra.

1. Suretyship is an accessory promise entered into, to secure the performance of some principal "*valid*" obligation.

2. The principal obligation here is not valid, because forbidden by law. La. Code. Arts. 1887. 8. 9. 1 Mar. Dig. 698. § 4 and 6.

3. The bond sued on is void because the *acceptance* of the appointment of Haw, as sheriff, was not in all things conformable to the *offer*—consequently there was no concurrence of *wills*. La. Code. Art. 1799, 6 Toullier 28. No. 27.

4. There was no principal contract to support the accessory one of suretyship; for Haw was inhibited from contracting the obligation of 1827 by law—for it was then morally impossible for him to give bond. 1 Mar. Dig. 69. § 4. La. Code Art. 1886.

5. The contract of suretyship in this case is void, on ac-

count of error. La. Code Art 1832. 1 Toul. 133. No. 168:—143. No. 181. Western District. September, 1880.

Mathews J. delivered the opinion of the Court.

This action is commenced and prosecuted for the purpose of recovering from the defendants the amount of Parish taxes, for the year 1827. It is against the late Sheriff of the Parish of St. Landry and his sureties on a bond taken for the faithful collection of said taxes. The plaintiffs obtained judgment in the Court below from which the defendants appealed.

The grounds of defence on the part of the sureties as delineated in the answer, are as follow.

1. Haw was not legally sheriff for the year 1827.
2. The sureties have lost their tacit mortgage on the property of their principal, in consequence of the neglect of the plaintiffs to have the bond recorded.
3. They illegally suffered his property to be seized and sold to pay the taxes due to the state.
4. That when the appellants agreed to become the sureties of Haw, it was on condition that William Haslett should join them in the bond.
5. Indulgence given to the principal by the plaintiffs.

The obligation was entered into between Haw as sheriff and persons duly and legally authorised to provide for the faithful collection of the Parish taxes for the year specified in the condition of the bond: and whether he was sheriff *de jure* or not, he was the lawful collector of the Parish by appointment or consent of the power whose business it was to see to the collection of these taxes. He was sheriff *de facto*, and, as such, is acknowledged by his sureties in assuming that situation, by signing the instrument of writing wherein they took on themselves the obligation resulting from their agreement, and should not now be permitted to deny the capacity of their principal thus acknowledged.

As to the second means of defence, it is believed, that no legal mortgage remained to the state or Parish on the pro-

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One notoriously acting as sheriff may rightfully be entrusted with the collection of the parish taxes, whether he be sheriff *de jure* or not; and his sureties are bound for the faithful performance of his trust.

Sureties who sign a sheriff's bond, thereby acknowledge him as sheriff *de facto*, & cannot, for any in-

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formality or defect in his appointment be permitted to deny the capacity of their principal thus recognized.

No legal mortgage exists in behalf of the state, or the parish on the property of its collecting officers since the adoption of the Louisiana Code in 1825.

The parish loses none of its rights against the sureties of its collecting officers, by not enjoining an execution of the state issued against such officers for arrearages of state taxes.

Parol testimony is inadmissible to shew that another person was to have signed a surety bond, in addition, when the bond itself does not shew the fact, or admit such an inference.

Indulgence given by not suing the principal will not exonerate the sureties, unaccompanied by an express grant of time.

perty of its collecting officers, having been abrogated by the Louisiana Code of 1825. This subject came regularly before the Supreme Court in the case of the *state vs. Wright's Administrators*; and the articles of the Code in relation thereto, received an interpretation against the pretensions of the present defendants. See 8 Mar. N. S. 216.

The third ground of defence seems to us to be wholly untenable. Why the Parish should lose its rights against the sureties of Haw, evidenced by a solemn written obligation, because its officers did not interfere in any or every pursuit made by third persons against him, we are totally at a loss to imagine.

On the fourth mean of defence, a bill of exceptions arose in the Court below to the opinion of the judge by which testimony was rejected, offered in its support.

It is stated that the officers of the Parish agreed to take as sureties the persons who signed the bond on which the present action is founded, and another, viz: Haslett; but the bond was deposited with the Parish Judge, without the additional signature; and although perhaps not regularly accepted at the time of its execution, the obligees by this suit have clearly demonstrated their will to accept it, without the addition of Haslett name.

The instrument itself affords no evidence whatever that he was to have become a co-obligor, or any indication that the applicants did not agree to bind themselves without him. It appears by the testimony that Haw was entrusted to procure the signatures of his sureties; and if he violated any confidence placed in him by them individually, in delivering the bond without Haslett's signature, his want of good faith in that respect ought not to be visited on the Parish, the officers of which seem to have finally accepted of less security than was in the first instance offered. The evil effects of this conduct (if they exist) must fall on the party confiding—viz: the signers of the bond. We are of opinion that the

testimony was properly rejected and consequently this ground of defence fails.

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The indulgence given by the plaintiffs, in not immediately prosecuting their action, unaccompanied by an express grant of time to the principal, has not the effect to destroy the obligations of the sureties.

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It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

HUMPHREYS vs. KING.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

1. The law empowering a judge of the late Superior Court of the territorial government, to appoint curators to minors, &c., and grant letters of curatorship to probate judges, is repealed and that authority vested in a justice of the peace.
2. A Court is not ousted of its jurisdiction in consequence of the sole judge of it, being interested in a suit *as being personally incapacitated*.
3. If a probate judge is a curator, his Court is the proper and *exclusive jurisdiction* to compel him to *account*, although from personal interest he cannot *sit*; yet there is no other jurisdiction to try the case, which is a *casus omissus*, that the judiciary cannot supply.

This suit was commenced in the District Court by the plaintiff against the defendant, as her *curator ad bona*, who is her uncle, and also the parish judge of the parish of St. Landry, to compel him "*to render an account of his administration.*"

Judge King was appointed curator *ad bona* to the plaintiff the 8th of October, 1812, by the hon. Geo. Mathews, then one of the judges of the Superior Court of the Orleans territory. The petitioner alleges that her curator has collected various sums of money, which were due and owing to herself and two brothers as heirs, amounting to \$4,186.39. She claims one third of this amount, as one of the three heirs to whom it was coming, to wit: \$1,395.46, with interest from the 6th of May 1813, until paid.

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The plaintiff further alleges that her said *curator ad bona*, is parish judge and *ex officio* judge of the Court of Probates, and cannot be sued before said Court, while acting as such judge. She prays that he may be cited to appear in the District, and compelled to render an account of his administration as *curator ad bona*, and be adjudged to pay over the amount claimed in the petition as due and owing to her.

The defendant excepted to answering in the District Court, because "it has no jurisdiction of the cause, but that the matters set forth, therein are only cognizable in the Court of Probates, &c."

The district judge sustained the exceptions to the jurisdiction and gave judgment for the defendant.

Lewis and Brownson for plaintiff. This action is brought to compel the defendant, as *curator ad bona* to a settlement. The case is a peculiar one, which must be brought in the District Court.

1. Because the defendant was appointed in 1812 *curator ad bona*, by a judge of the Superior Court of the late territory of Orleans, he being a judge of the Court of Probates in his own parish, must account to the Court that appointed him, and cannot be compelled to a settlement in his own Court. Acts of 1811. P. 146. §. 2.

2. The District Courts possess the same powers as belonged to the superior Court of the territory. 1 Moreau. Dig. 295. Code Prac. 924. No. 2. 9. 925. 998. 1013. 12. Mar. 230.

Bowen for the defendant. The question here is whether the District Court possesses the jurisdiction to try this case? I contend it has not!

1. It is a well settled principle that Probate Courts have exclusive jurisdiction of all the matters committed to them.

2. This being a suit to compel as *curator* to account and pay over certain funds, is peculiarly within the province and jurisdiction of the Court of Probates. 4 Mar. N. S. 536.

Code of Prac. 924. 5 Mar. N. S. 136. Acts of 1813. Page 102. §. 1. Acts of 1828. Page 160. Western District.
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Martin J. delivered the opinion of the Court. The plaintiff is appellant from a decision of the District Court sustaining the defendant's plea to its jurisdiction.

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The latter who is parish judge of the parish of St. Landry, was under the territorial government, appointed *curator* of the plaintiff, then a minor, by one of the judges of the Superior Court. The object of the present suit was to obtain a settlement of accounts, which the defendant contended the District court had no jurisdiction to act upon.

It has been contended by the appellee's counsel, that by the Code of Practice 924. No. 9. the Court of Probates have the *exclusive* power to compel curators to render their accounts ; and consequently District Courts are without jurisdiction for such an object.

The appellant's counsel has urged that the defendant being parish judge, and as such *ex officio* judge of the Court of Probates of his parish, is not sueable in this Court : and therefore, the Court being without jurisdiction of the present case, the District Court, which has a general jurisdiction of all cases not exclusively given to another Court, is not ousted of its jurisdiction : Further, that the curatorship having been granted by a judge of the Superior Court of the late territory, ulterior proceedings—were to be had in that Court ; and all cases pending therein have been transferred to the District Courts, whose jurisdiction extended to *all civil cases*, when the matter in dispute exceeds \$50. C. P. 126. Further, that by the Code of Practice, Article 997, judges of Probate Courts can call to account those curators, only, whom they have appointed.

1. The act which authorised judges of the Superior Courts of the territory to grant letters of curatorship to probate judges has been repealed, and the authority has been vested in a justice of the peace.

The law empowering a judge of the late Superior Court of the Territorial government, to appoint Curators to Minors, &c,

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and grant letters of Curatorship to Probate Judges, is repealed and that authority vested in a Justice of the Peace.

A Court is not ousted of its jurisdiction in consequence of the sole Judge of it, being interested in a suit as being personally incapacitated. If a Probate Judge is a Curator, his Court is the proper and exclusive jurisdiction to compel him to account although from personal interest he cannot sit; yet, there is no other jurisdiction to try the case, which is a *casus omissus*, that the judiciary cannot supply.

2. We are of opinion that a Court is not ousted of its jurisdiction, by the circumstance of the sole judge of it, having an interest in a suit, as being *personally incapacitated*.

3. In such a case we do not believe the jurisdiction of the court is affected—and it is the province of the legislature to make special provision; as they have in case of a district judge. Till this be done, the case is a *casus omissus*, which does not derange the jurisdiction of the Court, and it is not for the judiciary to apply the remedy.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

BOOKER vs. LASTRAPES & AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

1. In a suit between the *endorsee*, who is the holder, and the drawer and endorser of a bill of exchange, the *consideration* may be impeached, and the question whether the drawer ever received consideration or payment therefor? enquired into.

2. And where from the evidence it appears doubtful whether the drawer of the bill has ever received the value, or any consideration therefor, the case will be remanded for a new trial.

This is an action on a bill of exchange drawn by the firm of Lastrapes Frères on a commercial house in New-Orleans, trading under the style and firm of Plauché & Courcelle, in favor of Louis F. Lastrapes who endorsed it, dated, Opelousas, 16th September, 1828. The draft was delivered over, thus endorsed, to Alphonse Desmare, cashier pro tem. of the branch bank at Opelousas, and by him transmitted to R. L. Booker, cashier of the bank of Louisiana, in New-Orleans, and who instituted this suit.

The defendants in their answer state, that on the 28th July 1828, they addressed a letter to Planché & Courcell, requesting them to accept a draft for \$1500, who replied they would. Lastrapes Frères on the 12th September, 1828, drew on Plauché & Courcelle for \$1500, payable to

Louis Vanhille, four months after date. The object in drawing the draft was to have it discounted at the branch bank at Opelousas. It was deposited there for discount accordingly, but without the endorsement of L. Vanhille. The defendants aver, that the draft never was discounted, and deny that the bank ever gave them, or L. Vanhille to whom it was made payable, any *legal or valuable consideration*.

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That soon after depositing the draft in bank, A. Desmare superseded the old Cashier, as Cashier pro tem, and called on Ludger Lastrapes, one of the defendants, to get the endorsement of L. Vanhille the payee. It was then discovered by mistake that it was drawn in favor of L. Vanhille instead of Louis F. Lastrapes, who is also made a defendant in this suit. To correct the error and put the draft in such a shape as might be discounted in bank, the draft or bill now sued, was given in lieu of it. The defendants allege, that when the draft was last drawn, they had no credit in bank on account of it, nor have they ever received any consideration from the bank, or from the plaintiff, for or on account of it. That it was drawn and deposited in bank to get discounted, but that neither the Lastrapes frères nor their co-defendant, who endorsed it, ever received any consideration for it.

The draft was presented to Plauché & Courcelle on the 20th of October, for acceptance, who refused. It was protested for non-acceptance and due notice alledged to have been given to the endorser.

From the testimony of A. Desmare, it appears when he arrived to take charge of the bank at Opelousas, that the first draft drawn by Lastrapes frères, payable to Louis Vanhille, was handed over to him by Mr. Saul the old Cashier, as so much cash, and received from Saul and counted as such. Desmare then called on L. Lastrapes, one of the defendants, and informed him there was some mistake about it, as

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the draft was not endorsed, Lastrapes gave the one sued on, payable to, and endorsed by his brother Louis Lastrapes. Desmare, as the agent of the bank, does not know, nor can he find out, that any consideration was given for the first draft. The second bill was given for the first. That at the time of the date of this draft, Lastrapes had a regular account in bank, but it does not appear from the books of the bank, that any money was ever paid either to Lastrapes or Vanhille for the said draft, nor that they had any credit for it on the bank books.

Desmare further testifies, that it is the custom of the bank not to give credit for the draft, on the books, when there is no check drawn for the amount of the draft.

There were two bills of exception, taken by the plaintiffs.

1. To the witness, Desmare's proving that no consideration was given for the draft ; or that the defendants received none.

2. To the decision of the Court, sustaining the defendants' objection to Desmare's detailing the declarations of Saul, made at the time he received the draft from said Saul.

1. *Brownson and Lewis* for the plaintiff, contended—

The evidence of Desmare going to prove *a want of consideration* in the draft sued on, was improperly admitted because it contradicts the admission on the face of the draft itself, *that value was received*.

2. The draft sued on, was transferred to the plaintiff in the ordinary course of business, and was received *not* subject to any equity between the parties.

3. The only cases in which a want of consideration can be pleaded, are in ordinary contracts where the instrument had been given through *error* or *fraud*, neither of which is alleged here.

4. The refusal of the district judge to permit Desmare the witness of defendants, to detail the declarations made by



Saul at the time of giving the draft to witness in 'bank, is *erroneous*, because their declarations make part of the *res gestae*. 1 Starkie on Ev. 36. 37. §. 20 21.

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*Garland* and *Simon* for defendants ; argued,

1. That the *want* or *failure* of consideration of a promisory note or bill of exchange might be properly inquired into, and proved as between the *payee* and the *maker*. 3 Mar. N. S. 599. 1 ib. N. S. 625. 8 ib. N. S. 556.

2. That the consideration of a note or bill might be *impeached* and the want of it enquired into, in the hands of an endorsee who was privy to the transaction or had notice of it. 2 Starkie. Ev. 281. 12 Johnson 306. 12 Mar. 402.

3. That the drawer of a bill may show by parol evidence that he received *no* consideration for it. 3 Mar. 640—1. ib. N. S. 90—2 Starkie. Ev. 277.

4. The fact of a bill being endorsed, is not conclusive evidence that it does not belong to the payee. The draft in this case was not received in the ordinary course of business : and the bank did not get it from the payee, but the makers.

5. A bill of exchange always imports a consideration ; but it is not to the *form*, or its being in *writing*, that the Law gives it this effect—it is to facilitate its negotiation. Chitty on bills 9.

6. The words *value received* in a bill or note are only *prima facie* evidence of consideration, and throws the burden of proof on the defendant. 7 Johnson 321.

7. If one bill be substituted for another, it is liable to all the *equity* incident to the one, in lieu of which it was given. 2 Starkie Ev. 292.

*Martin Judge*, delivered the opinion of the Court.

This is a suit on a bill of exchange, drawn as an accommodation paper, given by the drawer to the cashier of the bank of Louisiana at Opelousas ; and by him sent to the mother bank, of which the plaintiff is Cashier. The defendants, the drawers, and endorsees denied any considera-

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tion was given for the bill. There was a verdict and judgment for the plaintiff and the defendants appealed.

The testimony shows that a bill of the same amount as the one sued on, subscribed by the same drawers, but not endorsed by the same payee, was handed among the bills and notes of the bank, by the former, to the present cashier of the bank at Opelousas, who called on the drawers with a request they should have it endorsed. They replied, it was the one drawn in favor of the person whose name appeared as the payee; and they gave another bill of the same amount in favor of another payee who endorsed it.

These facts were deposed to, by the new Cashier, who said, nothing in the books of the bank, showed any payments by the former cashier for the bill—nor was any made by the New Cashier: that bills were often purchased by the former cashier without the intervention of the board. He paid the money often without making any entry on the books, or requiring any check or receipt; and even when he placed full confidence in the drawers he did so before the bill was endorsed.

On his cross examination the witness deposed, that the drawers in giving the second bill, stated, they had not been paid the amount of the first, but he told them this was a matter of no moment, as he, the witness had taken the bill as cash from his predecessor to whom the drawers should look for payment.

The appellants' counsel has urged, that they were entitled to a new trial, and the judge erred in refusing it. They have contended, the appellees having given by the cross examination, evidence, that when the appellants gave the second bill, they declared the consideration, or amount of the bill was not paid them; and it is not pretended any was paid afterwards.

The appellee's counsel has urged that the drawers were called upon by the new cashier, on the behalf of the bank for an endorsement which they were bound to procure and

which the bank was entitled to demand, even if the former cashier had not paid the money—and by giving the new bill unconditionally, they admitted the bank's right to the amount of the bill.

1. It has appeared to us in the absence of positive testimony, it was not easy to presume (from the mere circumstance that cashiers, when they have full confidence in drawers; pay them the amount of their bills, before they are endorsed so as to transfer the payee's title) that in the present case the cashier had such a confidence in the drawers and paid them the amount of this bill.

The appellee's counsel has urged that strong presumption of this arises from the delivery of the second bill to a person who denied the obligation of the bank to pay for it.

We have deemed it best to remand the case for a new trial.

It is therefore ordered adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed, the verdict be set aside, and the case remanded with directions to the judge *a quo* to proceed therein according to Law: the appellee paying costs in this Court.

**GREIG &c. vs. HATHERN.**

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT THE JUDGE OF THE SIXTH PRESIDING.

Where a person permits another, who is living about his house, and sometimes doing business for him, to have access to his bar and drink his glasses without charge, in a subsequent settlement of the accounts between the parties, the inn keeper will not be permitted to make out an account against such person for his bar-bill; but such an account will be considered an *after thought*, and be disallowed.

This suit is brought by the curator of the vacant succession of James Keith deceased, against William Hathern to compell him to explain and settle a certain partnership transaction which had existed between them in the life time of Keith, and to require Hathern to pay over to the suc-

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In a suit between the *endorsee*, who is the holder, and the drawers and endorser of a bill of exchange, the *consideration* may be impeached, and the question whether the drawer ever received consideration or payment therefor? enquired into.

And where from the evidence it appears doubtful whether the drawer of the bill has ever received value, or any consideration therefor, the case will be remanded for a new trial.

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center such balance as due and owing on account of said partnership.

In 1824 Keith entered into an agreement to make certain advances to Hathern, who kept a public tavern in Vermilionville, and also was occasionally to give his personal attention ; in consideration he was to have his boarding gratis and the profits of the tavern divided between them.

On the 17th of June 1824, Keith advanced to Hathern \$450 to be laid out in New-Orleans for merchandize and groceries for the use of the tavern and bar. On the 1st September 1824, Keith further advanced \$67, for which Hathern gave his receipt payable on demand. On the 23d October following Keith made a still further advance of \$190, and on the 23d December again advanced \$25. 17 for the purchase of a barrel of liquor. In February 1825, Keith advanced \$133. 12, and in April a further advance of \$81 75, in liquors purchased in New-Orleans and delivered over to Hathern : and also paid \$8 for corn and advanced \$10 in cash, and Hathern's due bill to one Eades, transferred Keith which remains unpaid ; Hathern also owes a balance of \$63—making a total sum of \$1028 78, due from Hathern to the succession of Keith.

The petitioner avers that a settlement has been repeatedly demanded of Hathern, who still refuses to render an account and settle the same; wherefore he prays to be cited and compelled to explain the partnership, render an account settle and pay over whatever amount may be justly due to the succession of Keith.

Hathern in his answer denied any partnership had ever existed between him and Keith ; that in June 1824 when Keith made the advance of \$450 to make purchases in New Orleans it was intended to have formed one between them, but when the goods arrived Keith refused, and he considered himself only personally bound to Keith for the amount of the advances made to him.

Hathern annexes an account to his answer of \$1019 17 against Keith's succession and demands judgment for it in his favor.

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The Court referred the accounts between plaintiff and defendant to referees—who found \$755 87 due to Keith's estate; besides 16 barrels of liquor imported by Keith from New-Orleans and paid for by him, but which was not proved to them, as having been received by Hathern. The referees also reported \$715 80 as due to Hathern from Keith's succession. In the account was an item of \$250 for Keith's *bar bill* during the time he lived with Hathern. The referees reported a balance of \$40 07 due Keith's estate. On the motion to homologate the report, the plaintiff's counsel opposed the item of \$250, for the amount of the *grog bill*, charged to Keith in defendant's account.

It was in proof that Keith drank much at the bar, but that no account had been taken of it, and no charge was made by the defendant while he lived there. There was no particular partnership proved—but Keith always declared he had an interest in the profits of the tavern.

The Court rejected the \$250 item for the *grog bill* and gave judgment for the Plaintiff for 290 07 with costs.

This cause was argued and explained to the Court by Mr. *Brownson* counsel for the plaintiff—and by Mr. *Crow* for the defendant.

*Mathews J.* delivered the opinion of the Court.

This suit is brought by the Curator of the vacant succession of one James Keith, to recover from the defendant certain sums alleged to be owing by the defendant to said succession on account of advances of property and money made to him by the deceased during his life time. An account was rendered by the defendant consisting of various charges and amongst others one for drinking expenses amounting to \$553 37 1-2 for about 16 months.

The account was submitted to referees who deducted

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Where a person permits another that is living about his house, and sometimes doing business with him, to have access to his bar and drink his glasses without charge, in a subsequent settlement of the accounts between the parties, the innkeeper will not be permitted to make out an account against such person for his bar-bill; but such an account will be considered an *after-thought*, and be disallowed.

about one half of this item, and on the trial of the cause, the Court below struck off the balance and rendered judgment in favor of the plaintiff, from which the defendant appealed.

The only question presented to this Court for decision is to ascertain whether the facts of the case as proven, justify the judgment of the District Court. It appears from the testimony that no account was taken or kept of the liquors furnished to the deceased; or at that time the defendant intended to make any charge—as he directed his clerk not to take any account of it. The idea of making this charge appears to have occurred as an after thought, and cannot be permitted to destroy the previous liberality of the appellant. It is not certain that the deceased would have drank so much unless the *potations* had been furnished gratuitously.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with cost.

#### BANK OF LOUISIANA vs. STERLING & AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

A promissory note beginning "I promise to pay," &c, and signed by several persons, is *several*, as well as joint in its obligation, and the parties may be sued jointly and severally and judgment rendered *in solido*.

Legal interest on sums discounted in bank, is the rate of banking interest, established by their charters. The *maximum of interest* on notes payable more than four months after date, at the Bank of Louisiana, is 9 per cent., which is the legal interest to be allowed on such judgments in its favor.

This is an action on a promissory note, executed by Alis Demaret, Tutrix, &c. of the minors of Jefferson Caffery, deceased, and W. Stirling, as joint makers, and Donelson Caffery as endorser, for \$640.25, dated, Opelousas, 26th June, 1828, and discounted at the Branch Bank of the State of Louisiana, at Opelousas. The note reads "*I promise to pay to the order of Donelson Caffery &c.*" but is

signed by two persons as drawers, already named. The note was regularly protested for non-payment, and suit instituted against one of the makers, (Sterling) and the endorser in the Parish of St Mary, at the May term, 1830.

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The defendant, Stirling, plead that he was only a security, and that the principal should be joined, and also prayed and claimed the right of discussion on the property of the principal, before he be made responsible. The plea of discussion, and joinder of the principal, who resided in a different Parish was overruled.

The defendant Caffery, answered separately, by saying the blank note on which his endorsement had been obtained, was filled up for a larger sum than he had agreed to endorse for, and prayed that the makers of the note be made liable to him for any loss he might sustain.

There was judgment for the plaintiff, for the amount of the note, with nine per cent. interest and costs.

The defendant Sterling appealed.

*Lewis & Brownson* for plaintiff. This case is a clear one for the plaintiffs—


1. Where two or more persons sign a note or obligation, beginning with the phrase or words "*I promise to pay, &c.*" they are jointly and severally bound. Chitty on Bills, Edition of 1821, p. 433.

2. The Bank is entitled to charge interest on all notes and obligations, payable four months after date, at the rate of nine per cent. from the time they are due, until paid. La. Code, 2895. 1 Moreau's Dig. 50.

*Bowen* for defendants. There are two questions in this case. 1. Will a person signing with the *drawer* of a note or obligation, beginning with the phrase "*I promise to pay, &c.*" be bound as a principal *in solido*, or only as common surety?

2. Can the Bank receive interest at the rate of nine per cent. on its notes or bills, after they become due and protes-

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ted, when it has already charged and received this rate of interest from the date of the discount until due?

*Martin J.* delivered the opinion of the Court.

The Bank sues one of the makers, and the endorser of an accommodation note, by them discounted.

The first defendant resisted the claim on the ground that he subscribed the note as the second obligor, and must be consequently viewed as the surety of his co-obligor alone.

The other defendant admitted his endorsement, but contended he was liable on the failure of the makers only.

There was judgment against both defendants *in solido* and they appealed.

The appellants' counsel has insisted—

1. The first defendant was liable for one half of the sum mentioned in the note, as the note is a joint one only.

2. The Court erred in allowing interest at the rate of nine per cent.

A promissory note beginning—"I promise to pay," &c. and signed by several persons, is *several* as well as joint in its obligation, and the parties may be sued jointly and severally and judgment rendered *in solido*.

I. The note though subscribed by two individuals is worded in the singular,—"*I promise to pay*." If a note signed by several persons and begin, "*I promise to pay &c.*" it is *several* as well as *joint*; and the parties may be sued jointly and severally. Chitty on Bills, Ed. 1821, 433.

II. The note was duly protested, and notice was duly given. Legal interest was therefore to be allowed.

Legal interest on sums discounted by Banks is, that established by their charters. La. Code, Art. 2895.

The plaintiffs' charter establishes *nine* per cent. as the maximum of interest which they may take on loans and discounts. 1. Moreau's Dig. 50, sec. 12.—When a note like the present is payable more than four months after discount or loan. We therefore think that the District Judge did not err in considering *nine* per cent as the rate of interest established by the charter, in the present case, and consequently as the legal interest stated in the Code.

It is therefore ordered, adjudged and decreed that the judgment be affirmed with costs.

Legal interest on sums discounted in Bank, is the rate of Banking interest established by their charters. The maximum of interest on notes payable at more than four months after date, at the Bank of Louisiana, is nine per cent, which is the legal interest to be allowed on such judgments in its favor.



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HUDSON vs. DANGERFIELD & AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL  
DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

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& AL.

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21. 66  
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Nothing in our jurisprudence authorises two executions issuing at the same time on one judgment, whatever be the number of persons against whom a joint recovery is had ; and though they reside in different Parishes.

Where two executions issue, one after the other, on the same judgment, although to different Parishes, the second is irregular; but nothing ought to prevent the execution of the first one.

If two executions issue simultaneously on the same judgment, and one of them be acted on, the other may be enjoined if attempted to be enforced also.

It is not enough to show mere irregularity to obtain an injunction—irregularity to the applicant, or apprehension of it, alone can authorise a resort to this extraordinary remedy for relief.

Relief by injunction is an equitable remedy, and those who seek equity must do equity.

An injunction will not be dissolved, even if ever so irregularly obtained, if it appears from the circumstances of the case, the party by an immediate application would be entitled to a new one.

A judgment was obtained at the fall term 1829 of the District Court of St. Martin by Elizabeth M. Dangerfield, Executrix of H. Dangerfield, and against the heirs of Charles M. Thruston for \$1838 78, with interest and costs. There were two heirs Alfred and Edmund Thruston. The petitioner was the wife of Alfred now deceased, and as such became his representative and heir. A *fi fa* was issued against the property of the plaintiff as the heir of Alfred Thruston, on the 12th December 1829, which was returned not executed on the 18th of January following. Two alias *fi fa*'s were then taken out—one directed to the Parish of St. Martin and the other to St Mary, but corresponding in form and amount with the one returned. The Sheriff seized several negroes on the one directed to St Mary, belonging to the petitioner. She obtained an injunction on the ground that the execution issued irregularly. 1. Because executions must strictly pursue the judgment, which these do not, by requiring interest when the judgment does not. 2. That

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no party is entitled to more than *one* execution at the same time.

The answer sets up that a partition of the succession was made between Alfred and Edmund Thruston as the heirs; and that the share allotted to Edmund remained in the Parish of St. Martin, and the share of Alfred was removed to St. Mary. The judgment being against the heirs of the succession of C. M. Thruston, and the succession having been partitioned and divided between them, it was deemed necessary and proper to issue an execution to each Parish, directing a credit of *one half* the judgment to be endorsed on each execution.

The execution which was levied on the share of the succession allotted to the petitioner's late husband, Alfred Thruston, is the one enjoined. There was judgment perpetuating the injunction on the ground that the execution issued improvidently; reserving to the defendant Dangerfield, the right of ascertaining by any legal means the extent of the plaintiff's liability under the judgment against Thruston's heirs.

The defendant in the injunction appealed.

*Brownson* for plaintiff in injunction. The execution must follow the judgment, and two executions cannot issue at the same time to different Parishes. The judgment condemned Thruston's heirs jointly, each one for his *virile* portion. It is not a judgment *in solido* which condemns each one for the whole.

2. The attorney for plaintiff in execution cannot order execution against one, representing one branch of the heirs, and at the same time order execution against joint property of the succession in an other Parish. Code of Prac. Art. 625—629.

*Bowen* for defendants and in reply. The execution pursued the body of the judgment. It issued against the heirs representing one half the succession in one Parish; and those representing the other half in another Parish. That if the

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judgment is joint, and the heirs have not claimed a division, the execution may be levied on the mass of the succession in the hands of the heirs. 2 Tidd's Prac. 910—912. 8 John 339. 2, Caines 250. Code of Procedure Civil 208—211.

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Where the property of the succession in the hands of the heirs is divided into *two* masses—two executions or a joint judgment may be issued against the whole, and be levied on each half as was done in this case.

*Martin J.* delivered the opinion of the Court.

The petitioner states that the present defendant obtained against the present plaintiff and others a judgment which was afterwards affirmed by the Supreme Court—[See 8 Mar. N. S. 232] on which she took out two [duplicate] executions—one of which was directed to the Sheriff of the Parish of St. Mary; and the other to the Sheriff of the Parish of St. Martin: that in the former, the Sheriff levied his execution on several slaves of the present plaintiff, which are advertised for sale.

The petition concludes with a prayer for an injunction, on the ground that neither of the executions follow the judgment; as they direct a levy of interest, of which the judgment does not speak—and on the ground that two executions cannot issue at the same time on one judgment.

The injunction was made perpetual; but the right was reserved to the plaintiff in the execution; to an alias, after having ascertained the part of the judgment for which the defendant in execution is liable. The former appealed.

The record shows that the executions follow the judgment which allows interest.

Nothing in our jurisprudence authorizes two executions issuing at the same time on one judgment; whatever be the number of persons against whom a joint recovery is had, although they reside in different Parishes.

Where two executions issue, one after the other, on the same judgment

The case is that of defendants residing in different Parishes, against whom there is a joint recovery. Duplicate executions were taken, on the back of which, instructions were given to the Sheriffs' respectively to levy the proportion due by the defendants residing in their respective Parishes.

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& AL-

although to different Parishes, the second is irregular; but nothing ought to prevent the execution of the first one.

If two executions issue simultaneously on the same judgment, and one of them be acted on, the other may be enjoined if attempted to be enforced also.

It is not enough to show mere irregularity to obtain an injunction—*injury* to the applicant, or apprehension of it, *alone* can authorise resort to this extraordinary remedy for relief.

Relief by injunction is an equitable remedy, and those who seek equity must do equity.

An injunction will not be dissolved, even if ever so irregularly obtained, if it appears from the circumstances of the case, the party by an immediate application would be entitled to a new one.

This mode of proceeding is certainly more expeditious than correct. Nothing in our jurisprudence authorises two executions issuing at the same time on one judgment, whatever be the number of persons against whom it may have been obtained: although the injury which may result from the mode resorted to, in the present case is not very obvious.

If one of the executions issued after the first—the irregularity is in the second only; and nothing ought to prevent the execution of the first. If they be issued simultaneously, and one of them, alone, as in the present case, be acted upon, the execution of the second, if attempted may be enjoined: But neither justice or equity forbid proceedings on the other. It is not enough to obtain an injunction to show irregularity—*injury* to the applicant or apprehension of it, can alone authorise a resort to this extraordinary relief.

We have said we would not dissolve an injunction irregularly obtained, if it appeared from the circumstances of the case, the party on an immediate application must have a new one. Why should you perpetuate an injunction to the execution of a writ of *fi fa* when it is, clear the party thus enjoined has a right to proceed to a new levy by taking out an alias or a pluries.

The apprehension that the second execution might be levied on the applicant's property in St. Martin, might have justified an injunction to the Sheriff of that Parish.

Relief by an injunction is an equitable remedy, and those who seek for equity must do equity themselves.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and that the injunction be dissolved—the defendants paying costs in both Courts.

**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**Supreme Court**  
**OF THE**  
**STATE OF LOUISIANA.**

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**SUPREME COURT—WESTERN DISTRICT,**  
**ALEXANDRIA, . . . . . OCTOBER, 1880.**

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*MONTGOMERY vs. RUSSELL.*

*Western District.*  
*October, 1880.*

*MONTGOMERY*  
*vs.*  
*RUSSELL.*

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL  
DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

In examining the evidence upon which the jury acted, if the Court is unable to concur with the jury in opinion—it will, in accordance with its usual practice remand the cause for a new trial, and the opinion of another jury.

*Thomas* for plaintiff. This is a suit brought to recover from the defendant *Russell*, the amount of two security bonds, with interest, damages and cost, which the plaintiff had to pay for *Russell* in the state of Alabama.

In the Court below, the jury found two verdicts—one for \$3,515 19, interests and costs, the amount of one bond;—the other for \$1,621 with like interests and costs, being the amount of the second bond. On the two sums thus found, the Court gave judgment.

The defendant had set up a claim for certain property on Dog river, near Mobile Point, which he had conveyed to the plaintiff for \$4000. This the plaintiff contends was intended to indemnify him against other securities and respon-

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sibilities he was under for the defendant, and which he had paid. It is shewn by the evidence in the cause.

*C. T. Scott* for defendant. The Dog river property was conveyed to the plaintiff to secure him against all his liabilities for the defendant. It was valuable and abundantly sufficient for this purpose, and has never been accounted for by Montgomery.

1. The defendant has the right to enquire into the validity of the judgments on the security bonds in Alabama, upon which the verdict and judgments are based in this Court. The original security bond should have been produced on the trial here, as the best evidence, and not a transcript copy. La. Code, art. 3005.

2. The security bond in the second case was originally given in Alabama for the hire of African slaves, and was illegal and void, because given for the hire of property illicitly brought into the country. The principal being absent at the time a recovery was had on it, Montgomery the security was remiss in not preventing such recovery. The validity of such judgment was a subject of proper enquiry here, and the verdict and judgment rendered on it illegal. La. Code, 3005. 6 Toullier 191, 183.

*Martin J.* delivered the opinion of the Court. This case was remanded from this Court at October term 1828—see 7 Mar. n. s. 288.

This case was remanded to have it ascertained whether the property conveyed to the plaintiff was for the purpose of securing him against any debts he might be compelled to pay for the defendant.

In examining the evidence upon which the jury acted, if the Court is unable to concur with the jury in opinion—it will in accordance with its usual practice, remand the cause for

The jury seem to have implied it was not. In this conclusion after a close examination of the evidence, we are unable to concur. In such a case, it is our practice so far to regard the verdict of a jury as to forbear acting in opposition to it, and to send the case back for the opinion of another jury.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed—the verdict set aside and the case remanded for a new trial. The appellee paying costs in this Court.

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a new trial, and the  
opinion of another  
jury.

SCOTT vs. CALVIT & AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL  
DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.

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An instrument of writing under private signature, and not proved by the subscribing witness, is still admissible as evidence of title where it had been four years subsequent to its date, recognised by authentic act; but it will only take effect from the latter date, without proof being made of the original deed.

At a probate sale where property is struck off to the brother of the Parish Judge who makes the sale, the latter may take a conveyance, and receive a valid title to the thing sold, without being considered a purchaser at his own sale.

But admitting it to be proved that the brother of the Parish Judge bought the property expressly for the latter, the nullity occasioned thereby, would be only *relative*, and could be taken advantage of only by the heirs, or creditors of the succession sold.

The plaintiff Thomas C. Scott claims 300 acres of land on Bayou Rapides adjoining himself above and the defendant Calvit below. It was confirmed to one Kilgour by virtue of a Spanish grant. After several conveyances, it came into the possession of Wm. Murray deceased, and at the probate sale of his succession C. T. Scott, (the brother of the plaintiff, and the Parish Judge who made the sale,) became the purchaser. He conveyed it to the plaintiff. It was held by the plaintiff, and those under whom he claims for 20 years, until the defendant Calvit took possession of 200 acres, in virtue of a sale from A. M'Nutt, the other defendant, who is cited in warranty.

The defendants set up older titles, and plead the ten and twenty years prescription. The confliction of these respective claims, and titles of the parties can only be understood

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by an actual inspection of the maps and plots of survey made out, and filed in the cause.

*Flint* for plaintiff, exhibited title and a plat or map of survey, to shew the correctness and superiority of plaintiff's claim to the land in dispute, and the correctness of the judgment of the Inferior Court.

*Winn* for defendant, explained from the maps and plots of survey and title papers, the reason why the defendant should hold the land in controversy,

2. He urged, the sale to the plaintiff was invalid, because in effect made to himself as Parish Judge through the agency of his brother.

*Mathews Judge*, delivered the opinion of the Court.

In this case the plaintiff claimed from the defendant, a certain tract of land as described in his petition for which he obtained judgment in the court below, and the defendants appealed.

Both parties claim title to different parts of an entire tract granted to Joseph Kilgour, the original vendor.

Several objections was made on the trial of the cause in the District Court to the manner in which the plaintiff deduces his title. The first was to the admission of a writing under private signature as not being established by the best evidence, in consequence of the plaintiff not having produced one of the subscribing witnesses to the deed.

An instrument of writing under private signature, and not proved by the subscribing witness, is still admissible as evidence of title, where it had been four years subsequent to its date, recognized by authentic act; but it will only take effect from the latter date, without proof

This instrument was about four years after its date recognized by the seller in an authentic act, and from this last date must take effect without proof of the original deed.

A second exception was taken to the last link in the plaintiff's chain of title; and in support of this exception it is alleged that he was in reality a purchaser at a probate sale made by himself as a Judge in that capacity, although the property was struck off to his brother, C. T. Scott, and afterwards conveyed by the latter person to him. The evidence of the case does not clearly establish this fact: and if it did, we incline to think that the nullity occasioned by it



would only be relative—to be taken advantage of by the heirs or creditors alone, of the succession which was sold.

In testing the correctness of the judgment of the Inferior Court, we shall consider the title under which the defendants claim, as the oldest. It was passed by authentic act on the 18th of June 1810. The *recognitive act* which is the commencement of the plaintiff's title in relation to third persons, was executed on the 22d September 1812.

The decision of the case depends principally on the construction which ought to be given to the original deed of sale under which the defendants' claim.

It purports to convey 132 American acres of land, to be taken, beginning at the lower limits of the vendors' tract, with one equal proportion of front on the Bayou, and depth agreeable to the whole quantity left of said tract of land; reserving to himself 20 arpens front in such a manner as to have 300 American acres, superficial, agreeable to the Spanish custom of surveying.

The testimony of M'Crummin a Deputy surveyor of the United States, shows that according to the Spanish mode of surveying, he surveyed for the plaintiff about 20 arpens front, which gives to him only the quantity of superficies called for by his title. Kilgour in his sale, under which the defendants make out their title, reserved to himself 20 arpens front, to make, with the depth which appertained to his land, 300 superficial acres—selling 132 with a front proportionate to the whole front of his land, which according to a plat made by Stone, a surveyor, and by which he sold, appears to be about 30 arpens—of these thirty, the defendants seem to hold eight or ten, being their proportion. The balance remained to the vendor, which has since passed from him to the plaintiff without prejudice to the claims.

It is therefore ordered adjudged and decreed that the judgment of the District Court be affirmed with cost—reserving to the defendants their right to claim in another action the value of the improvements made by them on the land and recovered by the plaintiff, if any they have.

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being made of the original deed.

At a Probate sale where property is struck off to the brother of the Parish Judge who makes the sale, the latter may make a conveyance, and receive a valid title to the thing sold without being considered a purchaser at his own sale.

But admitting it to be proved that the brother of the Parish Judge bo't the property expressly for the latter, the nullity occasioned thereby would be only *relative*, and could only be taken advantage of by the heirs or creditors of the succession sold.

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STEWART  
vs.  
CARLIN & AL.      APPEAL FROM THE COURT OF THE SIXTH JUDICIAL  
DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.

When interrogatories are propounded to the plaintiff to be answered in open Court, and no day moved for and fixed by the Court on which to answer ; the plaintiff's neglect to answer will not authorise the interrogatories to be taken for confessed.

When the defendant annexes interrogatories to his answer and prays " that the plaintiff may be ruled to answer them in open Court," he must according to the provision of the 351st Article of the Code of Practice, move the Court to appoint a day for the plaintiff to appear and answer ; and not having done so, he will be considered as having waived his right and dispensed the plaintiff from the obligation of answering.

Dennis Carlin executed his note to Dr. Stewart on the 13th of May 1880, for \$227—payable on demand with ten per cent interest until paid.

The note was given for medical services. The defendant alleges that there was an understanding between him and the plaintiff that payment was not to be demanded until the ensuing year : and that notes and accounts on other persons were to be taken in payment. That the medical charges were exorbitant and the note only given to settle and liquidate the account. The defendants put interrogatories calling on the plaintiff to *say on oath in open Court*, if the foregoing statement is not true, and that this agreement took place. The interrogatories were not noticed or ordered by the Court to be answered. The plaintiff had judgment for the amount of the note and interest. Carlin appealed.

*Dunbar and Wilson* argued for the plaintiff.

*Briggs and Winn* for defendant.

*Martin J.* delivered the opinion of the Court.

This is an action on a promissory note. The defendant pleads the general issue ; and that the plaintiff agreed to suspend his right of suing for a period not yet expired.

There was also a plea of reconvention. His counsel in

this Court urged that interrogatories were put to the plaintiff in the answer, to which the necessary affidavit was annexed. That the plaintiff did not object to answer any of these interrogatories—that therefore they ought to have been taken as confessed; had they been, the verdict must have been for the defendant. Code of Prac. Art. 350.

It may be true that when the defendant does not seek to avail himself of that part of the Code of Practice, (art. 350) which authorises him to require, that interrogatories be *answered in open Court and in his presence*: and the plaintiff files his objections, the interrogatories must be answered without the intervention of any order of Court. But when the party avails himself of the 351st Article, the answer must be given on the day appointed to that effect by the Judge.

In the present case the defendant in his answer prayed that the plaintiff might be ruled to answer upon oath, *and in open Court*. He had no right to do so, except under the 351st Article of the Code of Practice; and that imposes on the plaintiff the obligation to appear in open Court, and answer on the *day appointed to that effect* by the Court. The defendant was therefore bound to move the Court to appoint a day. His neglecting to do so, dispensed the plaintiff from the obligation of appearing; and by proceeding to trial without procuring the appointment of a day, the defendant waived his right to the plaintiff's answer to the interrogations.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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CARLIN vs. STEWART & AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Actions for slander and defamation may be sustained under our Civil Code, without resorting to the Civil Laws of other countries, which are said to be repealed by our Statute of 1828.

In actions of slander and defamation of character, the jury or Court must

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When interrogatories are propounded to the plaintiff to be answered *in open Court*, and no day moved for and fixed by the Court on which to answer; the plaintiff's neglect to answer will not authorise the interrogatories to be taken for confessed. When the defendant annexes interrogatories to his answer and prays "that the plaintiff may be ruled to answer them *in open Court*," he must according to the provision of the 351st Article of the Code of Practice, move the Court to appoint a day for the plaintiff to appear and answer; and not having done so, he will be considered as having waived his right and dispensed the plaintiff from the obligation of answering.

Western District. often allow damages, when no special damage is shown to have been sustained.  
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Professional men are often unable to exhibit positive proof of the injury done to their reputations by malicious persons and slanderers, and would be in many cases absolutely remediless, if a jury or a Court are not allowed to find a guide in the dictates of their consciences.

On the score of the quantum of damages the jury are the legitimate judges, and unless they clearly err, the verdict ought to stand.

Carlin instituted suit to recover damages of Stewart for calling him "*a perjured villian*" and laid the damages at \$5000.

Dr. Stewart had given medical attendance to a negro woman, a nurse, belonging to the estate of Curtis', but who lived in Carlin's family at the time. His bill amounted to \$56. He called on Carlin, whom he believed was cognizable to all the facts, and would prove his account to the administrator of Curtis's estate. The witness said the bill was exorbitant. That Dr. Stewart had only visited the negro once when first called in, and gave two way visits. When Carlin had thus testified, the Doctor became enraged, and declared publicly that Carlin had sworn to a lie! "that he was a perjured villian!"

The defendant plead not guilty—and was permitted to call witnesses to show that his bill for medical services was reasonable and just—consequently he had good reason for believing as true what he charged upon Carlin.

The testimony shows that Doctor Stewart uttered the slanderous words in great haste and in the heat of passion. It also appears in proof that the plaintiff sustained no real injury by the slander. That those who knew him did not believe the charge to be true. It excited some little feeling in his favor, and was rather an advantage than an injury to him. It was likewise in proof that Stewart had attended faithfully to the negro he was called in to see. That she had a very severe attack, and it was the opinion of one or two witnesses who saw her, that it must have required great skill and attention to save her life.

The jury however found a verdict of 1000 dollars for the plaintiff. It appeared from the record that the verdict was given in by the Jury on the 3d of May—judgment rendered on the verdict and *entered upon the minutes*, the 7th of May and signed by the Judge the same day. A motion for a new trial was made on the 10th and 11th of May—which was overruled as not being made in time. The defendant appealed.

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*Briggs and Winn* for the plaintiff; contended that the action for slander, and the finding exemplary damages should be maintained and was properly brought. 5 Black. Com. 334. Code of Practice Art. 554 was cited to show the motion for a new trial was not in time.

*Dunbar* for defendant. This action can only be sustained on the article 24 of the La. Code; as no special damage was proved none can be recovered. Pandects Françaises 10 Vol. 82 391. 11 Toullier 154. 4 Martin Rep. Juris. 25.—Clef de Loi Rom. 63 112 132.

The motion for a new trial was in time. Three whole days between the rendition of Judgment and signing must be allowed to move a new trial. It may be moved for and granted at any time before signing judgment even after the three days between rendering it on the minutes, and signing it may have elapsed. 5 Mar. N. S. 319.

*Martin J.* delivered the opinion of the Court.

This is an action of slander for calling the plaintiff "*a perjured villain*." The plaintiff had a verdict and judgment for 1000 dollars. The defendant made an unsuccessful effort to obtain a new trial—and appealed from the decision of the District Court refusing it.

The appellees counsel has contended the motion came too late, and if it had been in time, ought to have been rejected.

We have examined the case in the point of view most favorable to the appellant,—as if the motion for a new trial had been in time.

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STEWART & AL. not proved.

The appellants' counsel has urged that since the repeal of our former civil law, we are without any remedy in cases of defamation; at least in cases where special damage is

The appellee's counsel has referred us to the case of Stackpole, vs. Henen. 5 Mar. N. S. 481, in which the action of slander seems to be recognized by this Court, and an act of the legislature passed at the following session of the legislature, bottomed on our decision. He has also cited the 21st, and the 2295th articles of the Louisiana Code.

Actions for slander and defamation may be sustained under our Civil Code, without resorting to the civil laws of other countries, which are said to be repealed by our statute of 1828.

In actions of slander and defamation of character, the jury or Court must often allow damages, when no special damage is shewn to have been sustained.

Professional men are often unable to exhibit positive proof of the injury done to their reputations by malicious persons and slanderers, and would be in many cases remediless, if a jury or a Court are not allowed to find a guide in the dictates of their consciences.

On the score of the quantum of damages, the jury are the legitimate judges, and unless they clearly err, the verdict ought to stand.

It is useless in the present case to enquire whether the repeal of the civil laws by a late act of the legislature, extends to any other but statutory laws. The parts of the Code relied on, would simply of themselves, authorise our Courts to sustain actions of slander.

In such actions the jury or Court, must, in many cases allow damages when no special damage is shewn.

If a professional man is maliciously, and without cause, charged with being absolutely ignorant of the first principles of the science he professes, he cannot administer positive or direct evidence of the injury he may have sustained. He must be in many cases without any adequate remedy at all—if the jury or a Court may not find a guide in the dictates of their own consciences.

On the score of the quantum of damages, the jury were the legitimate judges, and we are unable to say they erred.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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FRANKLIN vs. ALEXANDER & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

The execution of a note upon which suit is founded being established, and its consideration shewn; the plea of usury set up against it appearing unfounded, judgment for the amount of the note, interest and cost will be affirmed

The note sued on was dated, February 19th., 1825, and had been given on a settlement between the parties for the balance due for the purchase of 8 slaves by the defendants from the plaintiff. The note was given for \$2,103 78 with interest at 10 per cent. until paid. It was given after several renewals of previous notes, in which it clearly appeared from the record, that conventional interest had been faithfully and correctly computed.

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The defendants set up in defence, a redhibitory defect in one of the slaves, which was wholly unsupported by testimony.—Also, that the plaintiff gave a written act of sale, which was without date and thereby incomplete, and prayed for its completion before they should be compelled to make payment. Finally, exception was taken to the plaintiff's answer to interrogatories as evasive and not categorical.

A motion for a new trial was made and overruled.

*Wilson & Flint* argued for the plaintiffs.

*Patterson* for defendants.

*Martin J.* delivered the opinion of the Court.

The defendants sued on their note, pleaded the general issue and a want of consideration.

Judgment was given against them and they appealed.

The execution of the note is established, and the consideration is a balance due for the purchase of sundry slaves. The plea of usury is not supported.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both Courts.

The execution of the note upon which suit is founded being established, and its consideration shewn; the plea of usury set up against it appearing unfounded, judgment for the amount of the note, interests and cost will be affirmed.

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*McLAUGHLIN* vs. *RICHARDSON & AL.*

*McLAUGHLIN*  
vs.  
*RICHARDSON*  
& AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL

DISTRICT THE JUDGE OF THE FIFTH PRESIDING.

Questions of fraud partake of both law and fact—of acts done, and their want of conformity to morality and established law, prescribing the rules by which property is held.

A sale which is merely fictitious, the fraud and nullity may be only relative—and such sale might be good as a donation, or only void as to previous creditors.

But when a sale is made with the avowed intention to defraud, the act is so contaminating and immoral, that it entirely vitiates the contract and renders it null and void to all intents and purposes.

The plaintiff and George Hamilton, one of the defendants intermarried the 4th of June 1814. On the day of marriage, previous to its celebration, articles of marriage contract were entered into between the parties, in which the wife is made to bring into the marriage 17 negroes, specified by name, estimated at \$5,000—subject to an incumbrance of \$2,500, which she owed on them : and also 500 dollars in other property. Hamilton stipulated to bring in a plantation of 1000 arpens of land, estimated at \$3,000—stock and farming utensils worth \$1500 and notes and credits to the amount of \$3,000.

The day before the celebration of the marriage and of making the marriage contract, Hamilton sells to his intended wife these very 17 negroes, which she the next day brings into marriage, for the alledged consideration of \$5,500. Three thousand dollars acknowledged to be paid, and her two notes taken for \$1,250 each, for the remainder.

On the 18th of December 1816. Hamilton and wife executed an act of sale to R. D. Richardson & S. W. Downs, by which they sold and conveyed the plantation, stock farming utensils and 34 negroes (being the 17 sold by the husband to the wife before marriage and their increase)—the whole for \$16,000.

In May 1829, the wife commenced the present suit against



her husband for a separation of property, and against Richardson for the negroes, alledging her right of mortgage on them.

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In the course of the trial the defendant Richardson made an affidavit that one Pierre Soubercase, since removed to the Kingdom of France was a material witness, to prove that the sale of the 17 negroes from Hamilton to his wife the day before marriage, "was made in fraud, without consideration, and with *the avowed intention to defraud.*"

It was admitted on the record that "*the facts set forth in this affidavit are true.*" This admission appeared by plaintiff's counsel and was not denied by her.

The parties went to trial, and the Judge charged the jury "that they should take this admission of fraud entire. That it was general i. e. the contract was made in fraud. If fraudulent because the price was not paid, then it might be good as a donation between the parties. The want of consideration would render the sale *fraudulent and void*, against creditors and others having a right *at that time*, but not against others requiring rights &c."

There was a verdict and judgment for the plaintiff—the defendant Richardson appealed.

*Winn; Flint and Thomas* for the plaintiff.

Contended 1st.—that the appeal bond was insufficient because it was made payable to M. A. L. Hamilton, instead of "*M. A. L. McLaughlin*" the maiden name of the plaintiff and the one in which suit is brought.

2. That the property brought by the wife into marriage was *dotal*; and that no particular form of expression is necessary to constitute a *dot*—and being such, could not be alienated by the wife, only in particular cases, this not being one of them. Civil Code 326. Art. 16 and 34—4 Martin Rep. 181.

*Bullard, Downs and Scott*, for defendants.

1. The sale of the 17 slaves from Hamilton to his in-

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tended wife, the day before marriage was *fraudulent and simulated*.

2. The marriage contract does not designate in what character or quality, the property is brought into marriage. It must expressly state that it is brought to support the marriage, to constitute it a dowry. Civil Code 324 Art. 12. 4 Partida. Tit. 11. Laws 2 10 11 12 13 15 and 17.

*Matheus J.* delivered the opinion of the Court.

This suit is brought for the purpose of obtaining by the plaintiff, a separation of property from her husband, Hamilton, and to recover from the defendant Richardson, certain slaves described in the petition, which she claims as dower, and which she alledges were illegally sold and transferred by her husband to said defendant.

The cause was submitted to a jury in the Court below who found a verdict for the plaintiff, and from a judgment thereon rendered, Richardson appealed.

The material facts of the case are established by written documents. 1. A sale from Hamilton to the plaintiff of the slaves now claimed by her, dated on the 3d of June 1814. 2. A marriage contract entered into between her and Hamilton, in which it is stated that she brought to the community of the marriage the identical slaves acquired from her intended husband, by the sale executed on the day preceding that of this contract which was made on the 4th of June 1814. 3. A sale executed before a notary by Hamilton and his wife to the defendant Richardson & S. W. Downs, in which the slaves now in question purport to have been sold and made, which the appellant claims title to. them.

On these facts the principal allegations opposed to the plaintiff's right to recover are—1. the nullity of the sale from Hamilton to her on account of simulation and fraud. 2. That the marriage contract by its term created no constitution of dowry, but only amounts to an acknowledgment or recognition of the property which each of the contract-

ing parties brought into community at the time of the marriage. Western District.  
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From this defence, our first inquiry relates to the act of sale, by which the wife acquired the slaves said to have been constituted as a dowry in the marriage contract. And according to our conclusion on this subject will depend the necessity of examining a second question relative to the character of this property whether dotal or paraphernal?

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Questions of fraud necessarily partake both of law and fact; of acts done and their conformity with morality and established laws by which property is held. In the present case the jury found their verdict under a charge from the Judge, on an admission by the plaintiff, that the sale by which she pretends title to the property claimed as dower, was feigned and fraudulent; and was *made with the avowed intention to defraud*. Notwithstanding this general admission he seems to have instructed the jury that they might consider fraud as relative; and that it could only be alledged by creditors of the vendor previous to the act of sale—and that although void as a sale, it is valid as a donation. In this respect we differ in opinion with the Judge *a quo* as to the legal effect of this instrument. Had it been merely fictitious his conclusion would perhaps be correct. But surely no system of jurisprudence founded on equality and justice, can tolerate and give validity to acts avowedly made with the intention to defraud. The admission is so contaminating, so explicitly immoral, that it must entirely vitiate the contract and render it *null* and *void* to all intents and purposes.

Questions of fraud partake of both law and fact—of acts done and their want of conformity to morality and established law prescribing the rules by which property is held.

A sale which is merely fictitious, the fraud and nullity may be only relative—and such sale might be good as a donation, or only void as to previous creditors.

But when a sale is made with the avowed intention to defraud, the act is so contaminating and immoral, that it entirely vitiates the contract and renders it *null* and *void* to all intents and purposes.

Considering the question of fraud in this case as one entirely of law, arising from the admission of facts by the plaintiff, we deem it *useless* to send the cause back to be tried by another Jury.

Under this fraudulent sale the appellee acquired no title in the slaves which it purports to transfer to her. They still remained the property of Hamilton—were his at the time of

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the sale made by him and his wife to the appellant and others who have thereby acquired title, &c. As to that part of the judgment which decrees to the wife five hundred dollars, as regards the husband, it is clearly correct, whether the property on which it is based be considered either as dotal or paraphernal. But we are of opinion that the question of privilege or mortgage on property sold and transferred by her husband should be left open.

This view of the case renders useless any inquiry into the character of the property alledged to have been settled as dower.

In relation to the objections made to the appeal bond on account of a misnomer of the obligee, we are of opinion that they cannot avail the appellee. The person to whom it is made payable is sufficiently designated. In the course of the proceedings, the plaintiff assumes the names alternately of M. A. L. McLaughlin, wife of Geo. Hamilton, or M. A. L. Hamilton, taking the surname of her husband as is customary amongst the population of the English origin. The principal use of names is to identify persons, and the identity required in the present instance is to ascertain that the plaintiff M. A. L. is wife of Geo. Hamilton.

It is therefore ordered adjudged and decreed that the judgment of the District Court be avoided, annulled, and reversed; and it is further ordered &c, that Judgment be entered for the defendant and appellant R. D. Richardson with costs in both Courts; and that the plaintiff do recover from her husband Hamilton, five hundred dollars, &c.

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**CRAIN vs. BAILLIO & AL.**

**APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.**

Compensation cannot be pleaded in cases of insolvency when the claim of the debtor to the insolvent, proposed to be compensated, has been acquired by such debtor, subsequently to the failure of such insolvent.

## OF THE STATE OF LOUISIANA.

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A claim due from an insolvent debtor to a partnership firm cannot be allowed in compensation of a debt due by an individual member of the firm to the insolvent.

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vs.  
BAILLIO & AL.

Richard W. Kay owed the estate of Jas. H. Gordon, deceased, \$765, for which he executed his three notes for \$255 each, dated January 15, 1820, payable in 1, 2 and 3 years from the date, with ten per cent interest from the date until paid. The notes were drawn payable to Maria C. Gordon, widow and administratrix of her husband's estate. Kay also gave a mortgage on a lot of ground in Alexandria, to secure the payment of these notes, it being the lot sold to Kay by Gordon. On the 19th of November 1821, Kay sold and conveyed this lot to Wm. Shipp, who afterwards sold it to R. A. Crain the present plaintiff, by deed duly recorded October, 12 1827. On the 3d. of November 1827, Shipp, Kay & Co. transferred all their claims against Gordon's estate, to said Crain; among which was a privileged one of \$303, 70, which had been ordered to be paid as such, by the Court of Probates as far back as April 1820. It appeared never to have been paid by the administratrix. The estate also owed Shipp, Kay. & Co. \$500 and upwards, for the purchase of goods. These were all transferred to Crain: and R. W. Kay who first gave his *three* notes and the mortgage on the lot now claimed by the plaintiff, was also a member of the firm of Shipp, Kay & Co.

The notes of Kay, given as above, were delivered up by the administratrix of Gordon's estate, on settling her account, as uncollected debts due it.

The estate of Gordon being insolvent, P. L. Baillio was appointed Syndic by the creditors. The two last notes of Kay still remaining unpaid, on the 19th March 1828, the Syndic obtained an order of seizure and sale against the mortgaged property, now in the possession of Crain, as third possessor.

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Crain obtained an injunction, and set up his claims on the estate of Gordon, as assignee of Shipp, Kay & Co. against the demand of the Syndic, arising on the two unpaid notes of Kay with the mortgage on the lot. The injunction was dissolved, and Crain appealed.

Winn for the plaintiff, insisted that Crain having become the *bona fide* owner of debts due by the succession administered by the Syndic, he has a right to sett it off against the claim of the Syndic on the mortgaged property in his possession.

Thomas and Flint for defendant, excepted to the sufficiency of the appeal and on the ground :

1. That it is only for *half over the nett amount* of the notes sued on, without *including interest* which had accrued ; and that the appeal ought to be dismissed.

2. The matters now in contestation have already been decided by this Court, in a suit between the same parties, and that it is now *res judicata*. See Crain vs. Baillio, 7 Mar. N. S. 273.

3. The claims of the plaintiff having been acquired since the insolvency of Gordon's succession, the Syndic had no power to admit them in compensation of the debt due the succession.

Mathews J. delivered the opinion of the Court. In this case the plaintiff claimed and obtained an injunction as subsequent purchaser, and third possessor, against an order of seizure and sale, which issued at the instance of the defendant in his capacity of Syndic, &c. and was levied on property which had been sold as part of the succession of the deceased J. H. Gordon, which he represents as Syndic and administrator as an insolvent estate. The case was heretofore before this Court, (7 Mar. N. S. 273) and the capacity of Baillio as Syndic, established and recognized, and cannot now be legally contested. The injunction obtained in the present instance was dissolved by the District Court, from which the plaintiff appealed.

The only question which the case presents, relates to the appellants' right to compensate a *privileged debt*, due from the deceased to Ship, Kay & Co. and regularly transferred to him, since the former judgment rendered by the Supreme Court. It is clear that compensation does not legally take place in cases of insolvency, when the debtor to the insolvent acquires claims against him subsequent to his insolvency. It was decided by our former judgment in this case, that the claim set up in compensation, being due to the firm of Shipp, Kay & Co, could not be pleaded, or allowed in opposition to one by Kay alone, to Gordon's estate.

It is true that the plaintiff has since the purchase of the property seized, and since he became owner thereof, acquired a right to this claim from all the firm of Shipp, Kay & Co. but he acquired this right at a time when it could not be allowed in compensation of debts due by Gordon's estate; for it was then insolvent.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Western District.  
October, 1880.

CHAM  
vs.  
BAILLIO & AL.

Compensation cannot be pleaded in cases of insolvency when the claim of the debtor to the insolvent, proposed to be compensated, has been acquired by such debtor, subsequently to the failure of such insolvent.

A claim due from an insolvent debtor to a partnership firm, cannot be allowed in compensation of a debt due by an individual member of the firm to the insolvent.

#### ROSS vs. PARGOUD.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Interest given by a judgment forms a part of it, and must be calculated in, and secured in the appeal bond, which together forms the judgment of the Court appealed from.

There is a clerical mistake, or typographical error in that part of the English text of article 575 of the Code of Practice, which says the appeal must be taken for "one half the amount of the judgment," &c. It should read "*exceeding by one half the amount, &c.*"

The appeal bond must exceed by one half the amount of the whole judgment appealed from, to entitle the appellant to a suspensive appeal.

And by the article 574 of the Code of Practice, the judge must in all cases, whether it be a suspensive appeal, or merely a *devolutive* appeal, fix the amount of the appeal bond, which is the legal sum.

Winn of Counsel for the plaintiff and appellee, moved to dismiss the appeal in this case—1. Because the appeal bond

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Western District.  
October, 1830.

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vs.  
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not having been given for the amount ordered by the judge *quo.*

There being no statement of facts made out according to law.

The order of the judge required the appeal bond to be executed in a sum *exceeding by one half, the amount* of the judgment above rendered, returnable, &c." The judgment was for \$1075 together with *judicial interest* from the 2d of October, 1828, and costs." The appeal bond *taken*, was for \$1700 only, being \$40 less than the principal sum, and *interest* and costs and *one half over* of the judgment.

*Flint* for the appellant, urged that the appeal bond was given for the sum required by law, and if the judge required a larger sum, than was warranted by the Code of Practice, the party was not bound to give it.

2. The Code of Practice, article 575 provides that the appellant shall give security "for a sum exceeding *one half the amount of the judgment, &c.*" In the present case, the appeal bond is even for more than one half over the amount of the judgment.

*Martin J.* delivered the opinion of the Court.

The dismissal of the appeal is prayed for, on account of the insufficiency of the bond. The Judge required it for a sum exceeding by *one half* the amount of the judgment. In making his calculation the appellant does not appear to have noticed that the judgment was for a principal sum *and interest*. The bond exceeds by one half the principal sum : but not this sum and the interest due at the rendition of the judgment.

Interest given by a judgment forms part of it, and must be calculated in and secured in the appeal bond which together, forms the judgment of the Court appealed from.

There cannot be any doubt that *interest* given by a judgment, is *part* of the judgment, and ought to be secured on an appeal as well as the principal sum.

But the appellants counsel urges that the bond is for the sum required by law, and if the Judge required a larger sum, the party was not bound to give security therefor : and he



has referred us to the Code of Practice, Article 575,—which speaks of a *sum exceeding one half the amount* of the judgment.

We believe there is a clerical or typographical error in this part of the Code, and that the intention of the article was as the district Judge has understood it. As far as our knowledge goes, it has been until now understood that the bond should be for “a sum exceeding *by one half* the amount, &c.” It is clear either of these articles “*by*” or “*of*” was accidentally omitted.

The French text of this article places it beyond a doubt, that the participle “*by*” was intended. But it is true the English and not the French text, is to govern. In the two next articles, 576 and 577, which treats of judgments for the recovery of slaves, moveable or real property, the appeal bond is required to be for an amount exceeding *by one half* the estimated value of such slaves or moveable property: and in the case of real property, the Code speaks of an amount exceeding by one half of the estimated value of the revenue, &c.

Before the Code of Practice on judgments for the recovery of a sum of money, the appeal bond was required to be for a sum not exceeding double the value of the matter in dispute. Acts of 1813. Ch. 11. See 8. 1 Mar. Dig. 436.

Were we to confine our attention to the Article 575 of the Code of Practice, we might be compelled to adopt the construction contended for by the appellant's counsel, we think that our duty requires our attention should be extended to the following articles of the Code, and the preceding laws; and in doing so we must conclude that the district Judge was correct in requiring security for a *sum exceeding by one half* the amount of the judgment.

But the appellants counsel has further urged that he gave security for \$1700, and this being evidently more than sufficient to cover costs, he entitled himself thereby, if not to a *suspensive*, at least to an appeal merely devolutive.

Western District.  
October, 1830.

ROSS  
vs.  
PARCOURT.

There is a clerical mistake, or typographical error in that part of the English text of articles 575 of the Code of Practice, which says the appeal must be taken for “one half the amount of the judgment,” &c. It should read “*exceeding by one half* the amount, &c.”

The appeal bond must exceed *by one half* the amount of the whole judgment appealed from, to entitle the appellant to a *suspensive* appeal.

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Ross  
vs.  
PARCOURT

And by the article 574 of the Code of Practice, the judge must in all cases, whether it be a *suspensive* appeal, or merely a *devolutive* appeal, fix the amount of the appeal bond, which is the legal sum.

Whether the appeal be intended to be *devolutive* and *suspensive*, or merely *devolutive*, the law requires a bond for a sum to be fixed by the Judge—Article 575. The Judge cannot grant the appeal without fixing the sum in which bond is to be given when he has done so, the sum by him fixed is the legal one, and a bond for a lesser one is not legal.

It is therefore ordered, adjudged and decreed that the appeal be dismissed.

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WLVN vs. SCOTT.

When a Probate Judge proceeds to a public sale of property under his own order of Court, he assumes the character of an auctioneer, and *as such* is not answerable for his conduct except under ordinary proceedings established by Law.

The Article 790 of the Code of Practice does not embrace the issuing a mandamus to compel an auctioneer to do his duty—it only applies to cases which have a tendency to aid the jurisdiction of the Supreme Court, which is appellate only.

This was an application to the Supreme Judge for a mandamus to compel a Parish Judge, acting as auctioneer, to adjudicate to the applicant, a certain piece of property, for which he alleges he was the last and highest bidder.

*Winn in propria persona* applied for a writ of mandamus to compel Thomas C. Scott, the Parish Judge of Rapides, to adjudicate to him and make a good title to a tract of land appraised to 900 dollars. The petitioner alleges that at the sale of the estate of Tabitha Jett, deceased, he became the last and highest bidder for a tract of 225 arpens of land, and that he bid the appraised value thereof, and no one bidding any more, he demanded of the Judge, who refused to adjudicate the land to him and make him a title accordingly. He avers he made a tender of the sum of 900 dollars which the Judge dispensed with, and refused to receive.

The petitioner prays for a writ of mandamus commanding the Parish Judge to adjudicate the land to him and make him a legal title thereto.

*Mathews J.* delivered the opinion of the Court.

This is an application to the Court to issue a mandamus to the Judge of probates for the Parish of Rapides to compel him to convey to the plaintiff a certain tract of land which he alleges he purchased at a sale of the succession of a certain Mrs. Jett.

The article 790 of the Code of Practice is relied on as authorising and requiring the Court of Appeals to issue the process now demanded.

We do not believe this article to be applicable to a case like the present. When a Probate Judge proceeds to a public sale of property under his own order of Court, he assumes the character of a Auctioneer, and *as such*, is not answerable for his conduct, except under ordinary proceedings, established by law.

It is true, that the expressions of the Code of Practice on this subject seems to embrace all possible cases. But the authority there granted, must be considered in relation to the constitution which allows to this Court appellate jurisdiction only: and its mandates should be confined to matters which have a tendency to aid that jurisdiction.

It is therefore ordered, that the plaintiff take nothing by his motion.

Western District,  
October, 1830.

WANN  
vs.  
SCOTT.

When a Probate Judge proceeds to a public sale of property under his own order of Court he assumes the character of an Auctioneer, and *as such*, is not answerable for his conduct, except under ordinary proceedings established by law.

The article 790 of the Code of Practice, does not embrace the issuing a mandamus to compel an Auctioneer to do his duty—it only applies to cases which have a tendency to aid the jurisdiction

#### HUGHES vs. HARRISON AT AL.

#### APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT THE JUDGE OF THE FIFTH PRESIDING.

A promissory note made payable to order is transferrable by, endorsement, only to enable the endorser or assignee, to endorse it over, or to resist the drawer's claim for compensation of sums due him from the transferor, on account of payment made before transfer, or before the note became due.

But the holder or payee of a note even payable to order, may transfer all his interest in it without endorsing it, in like manner as in a cession of goods or consignment to trustees.

Parol testimony is admissible to prove the sale and transfer of a note payable to order, without endorsement, or written transfer.

Western District.  
October, 1880.

**HUGHES**

vs  
**HARRISON & AL.**

One of the payees of a promissory note, who together with the other, have sold or exchanged it without recourse on them, is a competent witness to prove the consideration for which the note was given.

Benjamin & Jemima Harrison (the husband and wife) executed their joint promissory note to Ailes & Morris, *or order*, for \$482. 16, dated January 1, 1827, payable the 1st. of May following. The note was given for merchandize sold, principally for the *use of the wife* and on her credit. Ailes and Morris sold or exchanged the note with the plaintiff by parol agreement; the latter taking it without recourse on the payees (Ailes and Morris).

Ailes, one of the original payees was called as a witness to prove the consideration of the note. His testimony was objected to, because he was an interested witness; the objections were overruled, and his testimony received. He proved that the goods for which the note was given, were principally furnished to Mrs. Harrison, one of the defendants, at her plantation. That she was separated in property from her husband in October 1827, soon after the execution of the note; and became the separate owner of the plantation, and negroes for the use of which, the articles of merchandise for which the note is given, were purchased.

The defendant Harrison plead a general denial. There was judgment for the plaintiff against both defendants *in solido*, for the amount of the note sued on,—they appealed.

*R. C. Scott* for plaintiffs. This case presents two questions:

1. Can the wife legally bind herself conjointly with her husband for debts contracted during marriage, under circumstances like these: he insisted she could. La. Code—Art. 2412—7 Mar. N. S. 64.

2. Can the holder of a promissory note payable to order, shew by parol testimony that he is the *bona fide* holder of it, without its being endorsed, or any written transfer, and recover on it? He maintained the affirmative. La. Code, 2612.—1. Mar. N.S. 301.

*Flint* for the defendants, contended for the following positions. Western District.  
October, 1830.

1. The wife cannot bind herself jointly with her husband for debts of his contracting, during marriage.

2. The plaintiff cannot recover because he shews no right of action or of property in the note sued on, either by endorsement or other written transfer. *Chitty on bills*—146, 155. 162.—*La. Code*. 1900. 2141.

*Martin J.* delivered the opinion of the Court. This case was remanded from this Court at its last term. (8 Mar.—N. S. 297). The judgment having been reversed without there being an answer to the amended petition, or any judgment by default.

On the return of the case to the District Court, the defendants still continuing to neglect to answer, a judgment was taken by default, which was afterwards made final.

The record shews it was admitted the defendants were husband and wife.

*Ailes*, one of the original payees of the note, deposed that no written assignment of the note sued on was made to the plaintiff; but the witness and *Morris* the other payee, gave it to the plaintiff in discharge of a debt of *Morris*, which the plaintiff was authorised to receive; and for which he gave *Morris* a discharge. Taking the note without any recourse on the witness or *Morris*. All this was done with the consent of the witness. The articles in payment of which the note sued on was given, were delivered by the witness then in partnership with *Morris*; and though charged to the husband and wife, were for the use of the wife, her children and slaves, and furnished on her responsibility; the husband being then insolvent and without credit.

It has been contended in this Court that :

1. The note was transferrable by endorsement only.

2. That the witness [*Ailes*] was incompetent to testify as to the consideration of the note.

HUGHES  
vs.  
HARRISON & AL.

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HUGHES

vs.

HARRISON & AL.

A promissory note made payable to order is transferrable by endorsement only, to enable the endorser or assignee, to endorse it over, or to resist the drawer's claim for compensation of sums due to him from the transferor, or account of payment made before transfer, or before the note became due.

But the holder or payee of a note even payable to order, may transfer all his interest in it without endorsing it, in like manner as in a cession of goods or assignment to trustees.

Parol testimony is admissible to prove the sale and transfer of a note payable to order, without endorsement, or written transfer.

One of the payees of a promissory note, who together with the other, have sold or exchanged it without recourse on them, is a competent witness to prove the consideration for which the note was given,

It is true it is said in the books, promissory notes payable to order, are transferrable by endorsement only : we understand by this that without an endorsement, the assignee is not invested with the right of endorsing over the note, or resisting the drawers claim for compensation of sums due him by the transfer, or on account of payment made before the transfer, and before the note was due. But he certainly can transfer his interest therein without endorsing the note, as is done in the case of a cession of goods or an assignment to trustees for the benefit of creditors. Endorsable paper, passes also by the assignment of law to executors, curators, heirs &c.

An assignment of personal property may be proved by witnesses.

Ailes, the witness appears from his testimony to be totally desinterested. The note having been taken by the plaintiff without any recourse. He therefore was competent to prove the consideration of the note.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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HARRISON & AL. vs. FAULK & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

A party evicted by a superior title, and who does not claim of the successful claimants the value of the improvements they have put on the land, cannot recover of a subsequent purchaser of the claimant the value of such improvements.

There is no privity of contract between the parties, after the lands have passed into the hands of subsequent purchasers ; and the party evicted has no lien or tacit mortgage on the land for the remuneration of expenditures for the amelioration or value of the improvements put on the land.

The present plaintiffs were sued and evicted from their possession of 240 arpens of land by Arpines' heirs. They omitted in their defence to claim the value of the improvements they had put on the land, and which had not been allowed in the judgment and eviction. Arpines' heirs sold

the land and improvements by them recovered, to the defendants, who dispossessed Harrison and wife without paying them for their improvements. This suit is brought to recover them from the present defendants as the actual possessors, &c.

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HARRISON & AL.  
vs,  
FAULK & AL.

There was judgment of non-suit against them and they appealed.

*Winn* for the plaintiff; insisted that the claim for improvements is a real right following the land, and must be paid for before the land can be taken, &c. La. Code. Art. 3416. *Poth. de prop.* No. 344-5. 9 Mar. 348. La. Code 2012. 3413.

*Flint and Downs for defendants.* The plaintiffs have lost all right and claim to damages for improvements put on the land, by suffering possession to be taken from them without asserting such claim. They can have no tacit lien or mortgage for remuneration, when no claim is asserted in the suit of eviction. La. Code. 3288-9.2007.

*Martin J.* delivered the opinion of the Court.

The plaintiffs claim the value of improvements made by them, while they were *bona fide* possessors of a tract of land which has since been recovered from them by the legal owners of it, the heirs of Arpine : and who afterwards sold it to one of the defendants, with all the improvements, without any mention or notice of the plaintiff's claim. He resisted it on the ground of absence of any liability on his part. The other defendant disclaimed any right and avowed himself the tenant of his co-defendant. There was judgment against the plaintiffs and they appealed.

There is no privity of contract between the parties, and if the plaintiff's claim succeeds it must be on the ground that the claim entitles them to a legal or tacit mortgage. But there are now no such mortgages—except in the cases in which it is recognised in the new Civil Code. Articles—3280—3288. The present is not one of these.

A party evicted by a superior title, and who does not claim of the successful claimants the value of the improvements they have put on the land, cannot recover of a subsequent purchaser the value of such improvements.

There is no privity of contract between the parties, after the lands have passed into the hands of subsequent purchasers; and the party evicted has no

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HARRISON & AL.

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lien or tacit mortgage on the land for the remuneration of expenditures for the amelioration or value of the improvements put on the land.

A claim for the value of improvements gives no real action. La Code 2007, 2009, 2010 and 2014. The cases of Labrie vs. Filiol—9 Mar. 348—and Stafford vs. Grimball. 1 Mar. N. S. 554, do not support the plaintiff's pretensions. In the first the improvements had not been sold with the premises. In the second there was a stipulation and charge imposed on the premises.

Both of these cases were decided before the promulgation of the new Civil Code of Louisiana.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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GRAYSON vs. WOOLDRIDGE & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

Where slaves are hired out for a term which is unexpired, and in the mean time the owner sells them to another, if such purchaser take them from the person to whom they were hired before the term expires, he will be answerable in damages as a trespasser.

In an action of trespass it is not necessary to state the trespass happened in any particular part of the Parish; because had it been stated, evidence that the trespass was committed in some other place in the Parish would have been good, even in criminal cases.

The plaintiff who was no party to the deed of sale between Wooldridge and Bowden was a competent witness to prove the declaration of Wooldridge's vendor, to show Wooldridge's knowledge of the plaintiff's right to retain the negro on hire.

The petitioner Grayson hired two negro boys from Bowden, one of the defendants, to continue from January 1829, to January 1830. On the 15th of October 1829, James A, Wooldridge one of the defendants, came to the plaintiff's plantation & took forcible possession of the two slaves, claiming them as his own. It appears he had purchased them of Bowden, the other defendant but a few days before, and with a knowledge of their being hired to the plaintiff. Grayson cautioned the defendant Wooldridge against taking the negroes. He was also permitted to prove the declaration of Bowden



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to Wooldridge, at the time of the sale, "that the negroes were on hire until the first of January and sold with that condition." His testimony was objected to—as also the charge of the District Judge, that no testimony was necessary to prove in what particular part of the Parish the trespass was committed.

There was a verdict and judgment against Woldridge for \$100, damage—and judgment of non-suit in relation to Bowden. Wooldridge appealed.

*R. C. Scott* for plaintiff, contended that it was not necessary to prove the particular part of a Parish in which a trespass is committed, to sustain an action of damages. Code of Practice 3, 31.

*Winn* submitted the case on the part of the defendant.

*Martin J.* delivered the opinion of the Court.

The plaintiff claims damages for the wrongful taking out from his possession two slaves, which he had hired for a term as yet unexpired.

The defendant Wooldridge pleaded the general issue, and claimed title to the slaves purchased from his co-defendant.

The plaintiff had a verdict and judgment against Wooldridge with \$100 damages.

There was judgment of non-suit against the other defendant. Wooldridge appealed.

The trespass was clearly proved ; and it appeared the appellant was informed by his vendor of the slaves being hired out to the plaintiff for a term not yet expired.

There was no evidence given of the place where the trespass was committed, and the petitioner stated no particular place of the Parish. The District Judge charged the jury there was no necessity for such evidence. The defendant's counsel took a bill of exception to this opinion, and relied on the Code of Practice 3. 31.

The Judge also charged the jury that the declarations of

When slaves are hired out for a term which is unexpired, and in the mean time the owner sells them to another, if such purchaser take them from the person to whom they are hired before the term expires, he will be answerable in damages as a trespasser.

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GRAYSON

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In an action of trespass it is not necessary to state the trespass happened in any particular part of the parish, because had it been stated, evidence that the trespass was committed in some other place in the parish would have been good, even in criminal cases.

Wooldridge's vendor at the time of the sale, were legal evidence to prove Wooldridge's knowledge of the right of the plaintiff to retain the slaves.

We think the District Judge did not err. Had a particular place in the Parish been stated in the petition, evidence of the trespass in another part of the Parish would have sustained the charge. This is the law, even in criminal cases.

The plaintiff who was no party to the deed of sale, might well give evidence of what was said by the parties against either of them.

An effort was made to procure a new trial on account of the excessiveness of the damages. The District Judge thought, and we think with him, that the verdict ought not to be disturbed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

#### RIFE vs. HENSON.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

Where an order to take depositions has been made at a previous term, and the plaintiff at whose instance it was made, takes out a commission in pursuance of it, and submits his interrogatories to which cross ones are filed, it is sufficient to entitle them to be read in evidence, although the usual affidavit has not been made and annexed.

If an appellant urge that the *subject* of the contract between the parties is illicit and the contract void, after having availed himself of its amount, to plead in re-convention and augment the sum in dispute to 300 dollars and upwards, and be thereby entitled to appeal, such defence will be deemed as coming with an *ill grace* from the party using it, and be disregarded.

Rife claims of Henson \$250 as the price of improvements made on certain Congress lands, according to an agreement with Henson.

Henson denies owing any thing—and says he purchased out all Rife's interest in the improvements in the year 1823. He then sets up claims in re-convention to the amount of \$216 for rent of the same lands, and \$160 which he alledges he paid for in improving them—and which he also says

are Congress Lands ; that the improvements on them were made contrary to law. Rife had a verdict and judgment for 45 dollars.

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RIFE  
vs.  
HENSON.

The defendant objected on the trial to the reading sundry depositions, because the commission under which they were taken, issued without the affidavit required by the Code of Practice. The reading was admitted on the ground, that at a previous term of the Court, a general order had been entered up to take depositions, and this commission was taken out in pursuance of it. A bill of exception was taken to the reading.

*R. C. Scott* moved to dismiss the appeal on the ground, that the sum appealed from was under 300 dollars. 2 Mar. N. S. 314.

*Winn* for defendant ; maintained the jurisdiction of appeal, because the sum claimed in re-convention exceeds 300 dollars, which alone would give this Court jurisdiction on the appeal.

2. The plaintiff had no right to recover because he sold the improvements which were made on public lands, and which cannot be the subject of sale because contrary to law. Ing. Dig. 362.

3. The exceptions to reading the depositions ought to be sustained, because they were taken contrary to the Code of Practice. Art. 430.

*Mathews J.* delivered the opinion of the Court.

In this case the plaintiff claims \$250 for improvements made on public lands, which sum he alleges the defendant agreed to pay to him for said improvements.

The answer contains a general denial and a plea in re-convention, in which upwards of 300 dollars are claimed. The cause was submitted to a jury, and on the evidence adduced they found a verdict for the plaintiff for the sum of 45 dollars, whereon judgment was rendered and defendant appealed.

Western District.  
October, 1890.

RIFE  
vs.  
NEWSON.

Where an order to take depositions generally, has been made at a previous term, and the plaintiff, at whose instance it was made, takes out a commission in pursuance of it, and submits his interrogatories to which cross ones are filed, it is sufficient to be read in evidence, altho' the usual affidavit has not been made and annexed.

If an appellant urge that the subject of the contract between the parties is illicit and the contract void, after having availed himself of its amount to plead in re-convention, and augment the sum in dispute to 300 dollars and upwards, and be thereby entitled to an appeal, such defence will be deemed as coming with an *ill grace* from the party using it, and be disregarded.

The record contains a bill of exceptions to the reading of answers to interrogatories of witnesses taken by commission, on the ground that the affidavits required by law did not precede said commissions. It appears that at a term of the Court previous to that at which the trial of this cause took place, a general order had been entered on the minutes to take depositions, and that cross interrogatories in pursuance thereof were filed, to the witnesses whose testimony was desired by the plaintiff, at whose instance the commissions issued. The Judge *a quo* was of opinion that the circumstances dispensed with the necessity of the affidavit, otherwise required, and in this we concur with him. On the hearing of the cause before the appellate Court, the counsel for the appellant urged a new means of defence, alleging that the whole contract between the parties is void as being in relation to an illicit subject: because the laws of the United States prohibit all settlements on public lands. This defence comes most *ungraciously* from him after his plea in reconvention, by which alone this Court has jurisdiction of the case. He claims 365 dollars, basing his claim on the same subject matter, alleged by the plaintiff. Such a defence cannot be tolerated at this time.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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PAULK vs. WOOLDRIDGE.

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT THE  
JUDGE OF THE SIXTH PRESIDING.

In the progress of a suit on a note for the purchase money of a tract of land, the Court will not delay the proceedings to grant an order of survey, to ascertain the supposed interference of other claims, and on the bare suggestion of the defendant that it is deficient in quantity, without any affidavit to that effect.

A plaintiff should not be delayed in the prosecution of his rights apparently just, by a bare suggestion of *deficiency* contained in the defendant's answer.

On the 23d of June 1826, the defendant Wm. Wooldridge and J. J. Bowie, executed their joint note to Vincy Faulk for \$600—for the purchase of two tracts of land containing 440 arpens.

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vs.  
WOOLDRIDGE.

The defendant Wooldridge acknowledged his signature to the note, but alleges in his answer that some of the land is in dispute, and is claimed by one Girod: and prays security against eviction, before he shall be compelled to pay the note: he also moved the Court for an order of survey to ascertain the quantity of land in dispute, which was refused.

R. C. Scott explained the case on the part of the plaintiff. Flint for defendant, submitted it without argument.

Mathews J. delivered the opinion of the Court.

This is a suit against one of the promissors on a note of hand, made by two persons *in solido*; the signature of the defendant to the note was established, and judgment rendered against him, from which he appealed.

The promise was made in consideration of the purchase of a tract of land, which the defendant in his answer, alleges to be deficient in quantity. On the trial of the case he demanded an order of survey from the Court to ascertain that fact, which was refused, and a bill of exceptions taken. The Judge *a quo* refused the order, because the application for it was not supported by the affidavit of the deficiency. In this we are of opinion he was correct. A plaintiff ought not to be delayed in the prosecution of his right, apparently just, by a bare suggestion of the kind contained in the defendant's answer.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

In the progress of a suit on a note for the purchase money of a tract of land, the court will not delay the proceedings to grant an order of survey, to ascertain the supposed interference of other claims, and on the bare suggestion of the defendant that it is deficient in quantity, without any affidavit to that effect.

A plaintiff should not be delayed in the prosecution of his rights apparently just, by a bare suggestion of deficiency contained in the defendant's answer.

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PARGOUD vs. MORGAN. & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.

The proceedings on thecession of the plaintiff's debtors are the best evi-

**MORGAN & AL.**

The defendants plead the general issue. There was a verdict on a second trial for the plaintiff for \$355—and he released all to \$55 of it before the judgment of the Court was pronounced. The release was given for the surplus damages after deducting what had been recovered from the sheriff.

It was objected on the trial that the bond was not valid, because the name of the sheriff had been improperly inserted as one of the obligees.

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1. The District Judge instructed the jury that the bond was taken under an authority of law, and was good as to Pargoud, although it might be bad as to the sheriff, the other obligee. But they could find for Pargoud alone.

2. That they might allow counsels fees in the assessment of damages, which the plaintiff had incurred in dissolving the injunction

3. The record of a suit containing a cession of the property of Ross, to show his insolvency, was offered in evidence, and received : but was objected to because final judgment rendered in it had not been signed by the Judge—a bill of exceptions was taken to its admission by the plaintiff.

This case was argued by *Mr. Winn* as counsel for the plaintiff : and *Mr. Flint* for the defendant.

*Martin J.* delivered the opinion of the Court.

This is a suit on an injunction bond—the defendants pleaded the general issue, and a tender.

The plaintiff had a verdict for \$242 14. He released the whole damages except \$55, for which judgment was entered. The defendants appealed.

Three bills of exception were taken. The *first* as to the opinion of the Court who admitted in evidence a judgment pronounced, and entered, but not yet signed, to prove the insolvency of the plaintiff's debtor;

The *second* was to the Judge instructing the jury that the bond sued on was taken in virtue of an authority given by law, which must be strictly pursued—therefore the name of Jonathan Morgan [the sheriff] one of the obligees, being inserted without his authority, the bond was void as to him ; but as to the other obligee, Pargoud, his name being inserted by authority of law, the bond was good as to him.

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The proceedings on the cession of the plaintiff's debtors are the best evidence to show his insolvency; and are admissible as proof when judgment rendered on them is not even signed.

In taking an injunction bond, the officer acts under an authority of law, and inserts the name of the obligees without their consent, so that where one is properly inserted, and another unnecessarily, the bond will be valid as to the right one, and the other nugatory.

In assessing damages on an injunction bond, the jury may very properly allow the plaintiff for his reasonable costs & trouble in obtaining a dissolution of the injunction in which the bond was taken.

A plaintiff may release a part of the verdict even before judgment is pronounced upon it, to avoid a motion for a new trial. "Every man may renounce his rights or any part of them."

The *third* was to the opinion of the Court instructing the jury they might take into consideration fees paid by the plaintiff (Pargoud) to have the injunction dissolved.

The proceedings on the cession of the plaintiff's debtor were the best evidence of his insolvency—and they were not the less so from the circumstance of final judgment being as yet unsigned.

The injunction bond is always taken without the consent of the party to be enjoined. The law requires the bond to be made payable to him, and renders it valid without his acceptance. The Judge therefore did not err in saying that as to him the circumstance of the insertion of his name did not vitiate the bond. The other obligee was the sheriff who had levied the execution—his name was unnecessarily inserted. But it does not appear this circumstance prevented the plaintiff from recovering the damages from the defendant; at all events this should have been pleaded in abatement.

In assessing the plaintiff's damages, the jury might well allow him a reasonable sum for his trouble and expense in prosecuting the dissolution of the injunction.

Lastly, it is urged the judgment is erroneous, as it does not follow the verdict as found by the jury.

The Plaintiff released such part of the damages found by the jury as he had received from the sheriff on account of his illegal conduct after the judgment was obtained. It is a common practice for a plaintiff to prevent or defeat a motion for a new trial, by a release of such part of the verdict as was illegally allowed. This can do no injury to the defendant, and every man may renounce his rights, or any part of them.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with damages.

**BENSON vs. SMITH.**

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

A mutual understanding or agreement between the obligor and obligee of



a note, to have the contract for which it is given rescinded, and the note cancelled, will be considered binding, although omitted or neglected to be actually carried into effect ; and a recovery on the note will be withheld.

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The plaintiff sold to the defendant a lot of ground, opposite to the town of Alexandria, on the river, for \$350, with interest. A note was executed, dated March 17, 1819, for 350 dollars. At the time of the sale, a bridge was about to be built across Red River, which would have connected the two sides, and rendered the lot purchased very valuable. The scheme of building the bridge, was soon afterwards abandoned, and the property became comparatively worthless. Benson made a proposition to Smith to rescind the contract, on the latter's agreeing to pay all costs. The latter assented. The parties went to the parish judge's office, to have their new agreement carried into effect, but the judge not being in, nothing more was done in the matter. Benson afterwards left the country, but ordered suit to be instituted against Smith on the note. On the trial, the defendant had a verdict and judgment. The plaintiff appealed.

*Flint*, for plaintiff, submitted the case without argument. No counsel appearing for the defendant.

*Martin J.* delivered the opinion of the court. This is an action on a promissory note. The defendant had a verdict and judgment. The plaintiff made an unsuccessful attempt to obtain a new trial, and appealed.

The execution of the note was admitted, but the defendant drew the following facts from the plaintiff by interrogatories. The note was given for the price of a lot on the side of Red River, opposite to Alexandria, where the plaintiff had laid out a tract of land into lots, several of which he sold. The building of a bridge across the river was, at that time, spoken of. The plaintiff, as well as many others, believed it would take place, but this was not made a part of the contract in the sale of the lots to the defendant.

The plaintiff proposed to the defendant afterwards to

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rescind the sale, on the latter paying all expenses, which he promised to do : And the plaintiff thinks they went together to the court-house to effect this, but not finding the judge there, they parted without doing it ; and the plaintiff continued willing to have it done, till his departure from the country, about three years ago, but the defendant never renewed the proposition, or evinced any disposition to avail himself of it.

A mutual understanding or agreement between the obligor and obligee of a note, to have the contract for which it is given, rescinded, and the note cancelled, will be considered binding, altho' omitted or neglected to be actually carried into effect ; and a recovery on the note will be withheld

The case has been submitted to us without argument, and it does not appear to us the jury erred. The contract on which the note was given, appeared to us to have been rescinded by the mutual consent of the parties, and a new one entered into, by which the defendant bound himself to pay the expenses attending the sale.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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**MADRY vs. YOUNG.**

**APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.**

Where A exchanges with B, the negro Jack for Aaron, and takes a bill of sale from B, providing " that if he makes a satisfactory title to Aaron by a particular day, named in the obligation or bill of sale, in that event is to be void—otherwise to be in full force and virtue." The *intent* of such an obligation is, that B conveys Jack to A by a title *defeasible*, on his executing a good title to Aaron.

But in default of B's making a good title to Aaron, Jack is the property of A, in virtue of the bill of sale, who first exchanged him with B, on the aforesaid condition. A will hold Jack in despite of the vendee of B.

John B. Madry purchased the negro Jack, now in suit between the plaintiff and defendant, of one Henry Hunter, in January 1828, for 475 dollars ; Hunter had bought him of one Robert Dawson.

Previous to these transactions, and in November 1825, John G. Young, the defendant, purchased the same negro of Jos. Young, who had purchased him at the probate sale of a succession. John G. Young exchanged Jack with Robert

Dawson for another negro, (Aaron): but as Dawson was unable to execute a good title to Aaron, Young refused to make an absolute title to Jack. Dawson then executed an instrument, called in the State of Mississippi, where these transactions took place, a mortgage, which was duly recorded there November 25, 1825, in which he mortgages Jack to Young, for the purpose of securing a good title to Aaron. The mortgage and bill of sale contains the following proviso: that if Dawson, his heirs, etc. shall well and truly make or cause to be made, to the said John G. Young, his heirs, &c. a complete and satisfactory title to the negro Aaron, on or before the first day of January 1828, then and in that case, these presents to be null and void, otherwise to remain in full force or virtue." Dawson never did make any other title to Aaron, but in the mean time sells Jack to Hunter, who sold him to the plaintiff Madry. In May 1828, Young obtained the possession of Jack from Madry by getting the negro on his premises. The present suit was commenced to recover back the negro, who he alleges was *illegally* taken possession of by the defendant; and lays his damages at \$500.

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The defendant alleges he purchased the negro of Joseph Young, who bought him at the sale of Hook's succession, 25th February 1825.

The jury found a verdict for the plaintiff, restoring him the negro, and 180 dollars in damages, and judgment accordingly.

The District judge charged the jury on the trial, "that if they found Dawson had sold and delivered the slave and received full value for him, it vested the legal title in Hunter and his vendee. This title being sold to Madry without notice, his title would be good. The mortgage sale of Jack by Dawson to Young was conditional, and its effect was to bind Dawson to make a good title to Aaron, or *pay his value*; the title to Jack was only effected to make good the contract.

*Dunbar* for the plaintiff contended as follows:

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1. The bill of sale or mortgage from Dawson to Young is not valid as to third persons, because it is not an authentic act, or accompanied with delivery. La. Code. Art. 2231. 2415 and 2417.

2. The *Onus probandi* is on the appellant to shew delivery, as it cannot be inferred. The subsequent sales from Dawson to Hunter, and from him to Madry were attended with delivery, were good as to the parties themselves, and as to third persons.

3. There being no evidence to shew the legal effect in Mississippi of the bill of sale from Dawson to Young, it must be construed according to the laws of this state. Starkie. Ev. Part IV. 569, Note X.

C. J. Scott for defendant, urged that the title to the negro Jack had never legally passed to Dawson; and relied on the bill of sale to shew that it never had; and the negro still remained the property of Young.

Where A exchanges with B, the negro Jack for Aaron, and takes a bill of sale from B, providing "that if he makes a satisfactory title to Aaron by a particular day named, the obligation or bill of sale, in that event is to be void—otherwise to be in full force and virtue :—" The intent of such an obligation is, that B conveys Jack to A by a title *defeasible*, on his executing a good title to Aaron.

But in default of B's making a good title to Aaron, Jack is the property of A, in virtue of the bill of sale, who first exchanged him with B, on the a-

Martin J. delivered the opinion of the Court. This was an action for the recovery of a slave. The defendant claimed title. At the trial he relied on a bill of sale from Dawson, to which was added a proviso, that if Dawson, his heirs, executors or administrators, shall well and truly make, or cause to be made to the said John G. Young, his heirs, executors, administrators or assigns, a complete and satisfactory title to the negro Aaron, on or before the first day of January 1828, then in that case these presents to be null and void—otherwise to remain in full force and virtue.

The Judge *quo* instructed the jury that the effect of this sale was to bind Dawson to comply with the conditions, "which were to make a good title to Young, for the other negro given in exchange for Jack, or in default thereof to pay the value of him. The title of Jack was effected to make good this contract." To this part of the charge to the jury the defendant's took a bill of exceptions.

In our opinion, the intention of the parties was not that

Dawson should be bound either to make title for Aaron, or pay the value of him : but to convey to Young a title to Jack *defeasible* by the execution of a proper conveyance or title to Aaron. Certainly Dawson could not have destroyed Young's title to Jack by payment of the value of Aaron. Young's title was on the execution of the instrument he relied on, complete, though defeasible on a subsequent event which does not appear to have happened. It had at once full force and virtue, and by the term of the contract was to *remain* on the event not happening before the day named, in full force and virtue.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed—the verdict of the judge set aside, and the case remanded with directions to the judge, not to give to the jury the above part of his charge: the appellee paying costs in this Court.

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foresaid condition.  
A will hold Jack  
in despite of the  
vendee of B.



# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## Supreme Court

OF THE

STATE OF LOUISIANA.

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SUPREME COURT—EASTERN DISTRICT,  
NEW ORLEANS, . . . . . DECEMBER, 1830.

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*HUNT vs. BOYD & CO. ET AL.*

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December, 1830

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If a creditor gives a receipt for a draft *in payment* of his account, the debt is novated

HUNT,  
vs.

This was an attachment against the schooner *Elizabeth* for supplies furnished. *BOYD & CO., & AL.*

The petition stated that John Boyd & Andrew Armstrong composed the firm of John Boyd & Co.—That they were owners of the vessel, and that Junelot was master, who was also made party to the suit. The latter in his answer disclaimed any interest in the vessel, and Boyd & Co. pleaded the general issue. The petition concluded with a prayer for judgment against the said John Boyd, Andrew Armstrong and C. Junelot.

The evidence showed that the schooner was purchased by Armstrong, and paid for with the note of the firm.—That previous to, and at the time of, this purchase, Armstrong was one of the firm of John Boyd & Co., and that the debt to the plaintiff was contracted subsequent to the purchase of the vessel.

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It further appeared that the plaintiff's account had been liquidated by Junelot, the master, who gave a draft on the defendants for the amount.—On the receipt of this draft, the plaintiff underwrote the account as follows: "Received payment by draft on John Boyd & Co. at thirty days' sight." The draft was protested for non acceptance, at maturity, and, together with the account, was attached to and made part of the plaintiff's petition.—There was judgment for the defendants, and the plaintiff appealed.

*Preston*, for appellants, contended:

1. The supplies were furnished to the schooner *Elizabeth*, which vessel has been attached and should be rendered liable for them.

2. Andrew Armstrong, it is contended, is her sole owner. If so, he is made a party defendant to this suit, and is bound to pay the whole of her disbursements.—C. C. Art. 2796.

3. The evidence sufficiently establishes that John Boyd & Co. are the owners of the vessel, and are therefore liable to pay her debts.—They received the profits.

*Hoffman* Contra:

1. The account sued on was paid, and extinguished the draft.—It is a plain case of novation on which it is a waste of time to hear an argument.—A person may novate his own debt, as if I owe a debt conferring a privilege, the creditor, by taking my note in payment, can no longer sue on the account and has lost his privilege.

2. The vessel is proved to have belonged to Armstrong and not to the defendants.—The plaintiff is bound to prove the correctness of his claim—it is not sufficient to make it probable.

*Porter J.* delivered the opinion of the court.

This action is brought for the balance of an account of sundries furnished to the schooner *Elizabeth*, of which it is alleged the defendants are owners. The suit commenced by attachment. There was judgment against the plaintiffs and they appealed.



The judge of the first instance decided the cause in favor of the defendants, on the ground that the evidence shewed they were not the owners of the schooner—that she belonged to Armstrong, one of the firm of Boyd & Co.; and that he could not be made responsible in his private capacity, in an action against the partnership.

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The same ground has been assumed by the appellees in this court, but the decided opinion we have on another part of the case, renders it unnecessary for us to examine the soundness of the position.

The captain of the schooner who is alleged to be one of the owners, liquidated the account of the plaintiff, and gave a draft on the defendants for the amount.

On the receipt of the order, the plaintiff underwrote the account in the following terms: "*Received payment by draft on John Boyd & Co. at thirty days sight.*"

We are of opinion that the plaintiff, by taking this draft as payment of the account, extinguished it; and that suit cannot now be maintained on that, which was discharged by the agreement which the receipt evidences. Were we to give our reasons for this conclusion, we could only repeat what we said in the case of *Baugh vs. How*, which was decided after much consideration. The counsel for the appellant, attempted in argument to distinguish that cause from the present one, but it is impossible to make a satisfactory distinction between them. In the former, the goods were sold to How, Ellis & Co. and *payment* received in a note of Talcut, one of the firm. In the instance before us the draft of the captain was taken. If he was part owner of the vessel, the analogy between the facts of this case and that already alluded to is complete. If he was not, then payment was taken in the bill of exchange of a third person, and the result is, if possible, still stronger against the appellant.—2 *Martin*, n. s. 144.

If a creditor gives a receipt for a draft in payment of his account, the debt is novated.

*Barrow*

This opinion renders it unnecessary to examine the bill

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of exceptions, and it is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

**TOWN vs. THE SYNDICS OF MORGAN, DORSEY & CO.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

In conditional obligations, the law at the time the obligation was contracted, not that in force when the condition takes place, must govern the rights of the parties.

The opposing creditor claimed to be placed on the tableau of the insolvent Dorsey, in preference to the creditors of Morgan, Dorsey & Co. by virtue of a promissory note which he held, upon which Dorsey was endorser.—The note was dated 27th May, 1825—endorsed the same day—payable one year after date, and protested at maturity. There was judgment for the opposing creditor, and the syndics of Morgan, Dorsey & Co. appealed.

*Eustis* for appellants.

1. The judgment must be reversed, because the Louisiana Code gives no privilege in the case made out by the appellee.

*Conrad* for appellee.

*Porter J.* delivered the opinion of the court.

This is an appeal taken from a judgment of the District Court, by which the endorser of a note, whereon the insolvent Dorsey was endorser, is placed on the tableau of distribution of said Dorsey's estate, and directed to be paid out of the funds of said estate, in preference to the creditors of Morgan, Dorsey & Co.

In conditional obligations, the law, at the time the obligation was contracted, not that in force when the condition takes place must govern the rights of the parties.

The endorsement was made at a time the Civil Code of Louisiana was in force. The note became due, and the protest was made after the Louisiana Code was promulgated. If the obligations of the respective parties is to be ascertained by the former, the judgment appealed from is correct. If by the latter it is erroneous and must be reversed.

The insolvent's obligation, as endorser of the note, was subject to the condition known to our law as the *suspensive*; that, which depends on an uncertain and future event. It depended, in this instance, on the maker paying his note when it became due, and on regular proceedings on the part of the holder, to protest in case of non-payment, and duly notify the endorser.

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On the first view of the case, it might appear that, as the holder of the note had no right of recourse on the endorser until failure of payment on the part of the maker, the extent of that right must be governed by the law at the time it accrued.

But more closely considered, it is clear that though the obligation could not be enforced until the condition took place, still there would have been no obligation without the contract entered into, antecedent to the failure of the maker to discharge his note. And whether the law, at the time the obligation was contracted, or that in force when the condition took place, should govern the rights of the parties, is not a difficult question. It is in our opinion, settled by positive provisions in our former and present code. Each of them declares "that the condition being complied with, has a retroactive effect to the day the engagement was contracted." The articles of the Napoleon Code, of which ours on this subject is a copy, were we know, in the greater number of instances, taken almost *verbatim* from the works of Pothier. In referring to that writer, we find that, after using the same language found in our code, he adds, and the right which results from the engagement is *deemed to be acquired from the time of the contract*. Such also was the doctrine of the Roman jurists. At the time this engagement was contracted, the plaintiff had a right in case of failure, to be paid before the creditors of the partnership. We therefore think there is no error in the judgment of the District

Eastern District Court. *Pothier, contrat des ob: no. 220. Toullier, vol. 6, no. 543. Digest, liv. 50, tit. 17, laws 18 and 144.*

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

THE SYNDICS OF  
MORGAN & AB.

### CLAGUE ET AL. vs. THEIR CREDITORS.

#### APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW ORLEANS.

An agreement made in New York to be executed there, must be governed by the laws of that state—if such contract is usurious and void by the laws of New York it will be considered so here, because this court must decide the cause here as it would be decided there. The statute of the state of New York prohibits taking more than seven per cent for the loan of money, and by the terms of the statute the prohibition is extended to wares, merchandise, or any thing else.

If in the exchange of notes between A and B, more than seven per cent per annum as interest be taken, the contract is tainted with usury, and void according to the decisions of the courts of New-York on that statute.

Those courts have established the maxim that by no shift or device can more interest be taken, or profit made, than that which the law permits on the loan of money.

When A agrees with B to exchange their respective notes bearing interest at the rate of six per cent. per annum, and in consideration thereof to insure with B the lives of different individuals, and to consign his sugar crop in Louisiana to B, for sale in New York on commission, this agreement is null and void under the aforesaid statute of New York against usury.

The facts are fully stated in the opinion of the Court, delivered by Porter J.

The Bank of the United States—the Bank of Louisiana—John Humphreys, and others, creditors of the insolvents, appeal from a judgment of the Parish Court, by which Israel Barker was placed on the tableau of distribution as a creditor.

Barker's claim is founded on an assignment made to him of notes executed by the firm of Kenner & Co. in favor of certain persons, by whom they were endorsed to a corporation in New-York, known by the name of "The Life and

Fire Insurance Company." The consideration of these notes was a contract entered into by the insolvents with this Company, by which the parties agreed to exchange their notes, payable at a distant time from the date of the agreement, with interest at six per cent. The insolvents at the same time covenanted to insure, and did insure a certain number of lives with the office at the usual rates. It also made a part of the contract, that the crops of the insolvents sugar estate should, be annually shipped to the Company and sold by them on the usual commissions.

To the claim of the appellee, growing out of this contract, the defence of usury is opposed.

The agreement was made in New-York, and was to be there executed: it must therefore be governed by the laws of that State. They prohibit the taking of more than seven per cent for the loan of money, and by the terms of the statute, the prohibition is extended to wares, merchandise, or *any thing whatsoever*.

The courts of that state have held under these provisions, that if A exchanges notes with B, and takes two and a half per cent commission for doing so, the contract is tainted with usury and void.—13 *Johnson* 4 v. 16 *ibid.* 367.

There cannot therefore, we think be a doubt, that if more than seven per cent was taken for the exchange of the notes now sued on, the contract was void, but whether it was so taken is the true difficulty in the case.

The obligations of each party bore interest at six per cent; and so far there was such equality as repels the idea of usury. But it is urged, the Life and Fire Insurance Company had a profit on the insurance of the lives and on the sales of the sugar, which bring them within the penalties of the statute. The appellee contends that these transactions, were each of them fair in themselves, and that if profits were made or to be made, a good consideration existed for them, independant of the exchange of notes—namely: the

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An agreement made in New-York to be executed there, must be governed by the laws of that state—if such contract is usurious and void by the laws of the state of N. York it will be considered so here because this court must decide the cause here as it would be decided there. The statute of the state of N. York prohibits the taking more than seven per cent for the loan of money, and by the terms of the statute the prohibition is extended to wares, merchandise, or *any thing whatsoever*.

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risk incurred in the insurance—and the labour bestowed, and pains taken in the sale of the crop.

We assume for a moment, that the Life and Fire Insurance Company refused to exchange their notes, unless the insolvents would also insure lives at their office and ship their crops to the Company for sale. The question then is, does the circumstance of the lender refusing to accommodate the borrower, unless the latter will enter into another contract, on fair terms, which apart from and unconnected with the lending, would be fair and legal, render the agreement for the loan of money, or the exchange of notes, null and void? It is one which on the first consideration of it, and for some time after, did not appear free from difficulty to us; further reflection, however, and a more attentive consideration has satisfied our minds, that it would not present a case of much embarrassment to the courts of the country where the contract was made. If the matter were *res integra* there would be, perhaps, considerable force in the objection, that the object of the statutes against usury was to protect the borrower against paying more than the legal interest. That when that object was attained, the laws cared not how much the lender received, and that he might innocently profit by the collateral agreement, when he did not take advantage of the borrower's necessities, to compel him to enter into an unequal and disadvantageous contract, in relation to other matters.

But the question is not *res integra* in the jurisprudence of that country where the agreement was made. The legislature of New-York, in imitation of that of England, seems to have had a great abhorrence of the offence of usury, and to have guarded against its commission, by prohibitions couched in language, at once as particular and comprehensive as words can express. Their courts of justice have not fallen behind the law makers in their determination to repress and punish the offence, and the statute with the dici-

If in the exchange of notes between A and B, more than seven per cent per annum be taken, the contract is tainted with usury, and void according to the decisions of the courts of New York on that statute.

sions on it, seems now to have established the maxim, that by no shift or device which the wit of man may invent, can more interest be taken, or profit made, than that which the law permits. Whether the borrower loses or not: the bargain which is connected with the loan seems to be considered as immaterial. The rule is, the lender shall not obtain more than the legal interest. We need not cite the cases. An examination of them we think, will shew the principle just stated, to result from the decisions of the common law courts on the statute against usury. We may however, refer to a very late decision in the Supreme Court of the United States, where this strong language is used: "a profit or loss incurred on the necessities of the borrower, no matter what shape it assumes, has always been adjudged to be a violation of the statute." *2d Peters* 537.

In the instance before us, the notes of each party bore interest at six per cent, and so far there was a perfect equality, but the Insurance Company refused to make the exchange, unless the insolvents insured lives, and agreed to send their crops to the company for sale. Profit such as this to the lender, or burthen on the borrower on a loan or exchange of notes the statute of New-York forbids, and we, who must decide the cause here as we think it would be decided there, are consequently compelled to consider the transaction void.

It was said, there was no evidence the Life and Fire Insurance Company made these matters a condition without which they would not give their notes. That for aught what appears on record, they may have applied to the insolvents to exchange their notes, and that the latter refused, unless the former would permit them to insure lives, and send them their sugar for sale.

There is no direct proof on record which of the parties proposed the exchange, but the conviction produced by the internal evidence presented by the transaction, is nearly as

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Those courts have established the maxim that by no shift or device can more interest be taken, or profit made, than that which the law permits on the loan of money.

Where A agreed with B to exchange their respective notes bearing interest at the rate of six per cent per annum and in consideration thereof to insure with B the lives of different individuals, & to consign his sugar crop in Louisiana to B for sale in New York on commission, this agreement is null and void under the aforesaid statute of N York.

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strong as any thing can be, that the first proposition came from the insolvents. The endorsement required on their notes—the mortgage taken on their plantation—the promise to send their crops for sale, all indicate, in a manner too clearly to be misunderstood, who was embarrassed, and who connected these agreements with the exchange of the paper. When we join to these reflections the utter improbability of a commercial house in New-Orleans going to New-York to insure lives, unless they were compelled to do so to relieve their pecuniary necessities, not a doubt remains on our minds that the transaction was such a one as the appellants represent it.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided, and reversed, and it is further ordered, adjudged and decreed, that the tableau be amended, by expunging therefrom the claim of Barker for the notes given by the insolvents to unite the contract with the Life and Fire Insurance Company, and it is further ordered that the appellee pay the cost of the appeal.

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*ABAT vs. HOLMES.*

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If the jury be permitted in the absence of the defendant, and without any application from the plaintiff, to reconsider their verdict and bring in another, the second will be set aside, and the cause remanded for further proceedings in the state it was when the jury requested permission to amend it.

This cause was submitted upon a statement of facts which are given in the opinion of the court.

*Slidel* for appellant.

*Seghers* for appellee.

*Martin J.*, delivered the opinion of the court.

The defendant was sued as endorser of a protested promissory note. He pleaded the general issue, that the plain-



tiff had released, or discharged the maker, &c. There was judgment against him and he appealed. Eastern District,  
December 1880.

ABAT  
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The statement of facts show, that the cause having been argued, the jury retired and returned with a verdict for the defendant, signed by their foreman, the counsel of both parties being present. The verdict was read in open court, and no objection being made by the plaintiff, the usual minute of the verdict was made by the clerk, and the counsel for the defendant left the court. The clerk makes, during the sitting of the courts, memorandums of what is transacted on loose sheets of paper, and after the adjournment of the court, and frequently on the following day, makes entries from these minutes on the record book in due form. After the rendering of the verdict, in the present case, two other causes were called for trial, on which the plaintiffs failing to appear, were non-suited, and the usual entries were made by the clerk; a third cause was afterwards argued, and the jury retired to consider of their verdict, and returned with one which was read in open court, and entered on the minutes. The judge having in the meanwhile, while the jury were out, examined the point of law on which he had charged the jury, on the motion of the counsel of the defendant in the present case, stated in a conversation with the gentlemen of the bar, after the jury had returned, and in their hearing, that the defendant's counsel, in the present case, had misstated the law, in insisting that the receipts on file (from the plaintiff to the maker of the note,) had operated a discharge of the endorser. This being heard by some of the jury, they requested to be allowed to reconsider their verdict, saying they had understood the judge, in his charge, to lay down the law differently. The judge permitted them to reconsider their verdict and instructed them that a release of some of the drawers of the note, for their part of the debt, did not discharge the defendant as endorser, who was a joint obligee with them, whereupon, without returning,

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vs.  
HOLMES.

If the jury be permitted in the absence of the defendant, and without any application from the plaintiff, to reconsider their verdict and bring in another, the second will be set aside, and the cause remanded for further proceedings in the state it was when the jury requested permission to amend it.

they found a verdict for the plaintiff, the defendant and his counsel being absent, more than one hour after they had given the first verdict, in favour of the defendant, and judgment was given on the second verdict for the plaintiff.

The appellant's counsel has urged that he is entitled not only to the reversal of the judgment of the District Court, but to our judgment for his client on the first verdict.

It is obvious the judge erred in allowing the jury, in the absence of the defendant, and without any application from the plaintiff, to reconsider their verdict, and in allowing them to bring another, after having stated the law to them, in a very different manner than he had done in a charge delivered to them in the presence of both parties—without allowing the party against whom the second charge was given, to make such observations as the charge, in the opinion of the court, might require.

But judgment cannot be given here on the first verdict—the proceedings of the court, unprovoked by and which took place in the absence of the plaintiff and his counsel, cannot deprive him from the right he had of moving for a new trial.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the second verdict set aside and the case remanded for further proceedings, in the state in which it was when the jury requested to be permitted to amend it, the appellee paying costs in this court.

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**CHEW & RELF vs. KEANE.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

If the plea of prescription be pleaded in the Supreme Court, the party to whom it is opposed may demand that the cause be remanded for trial upon that plea—but if it appear that substantial justice has not been done, a new trial will be ordered.

Suit upon a promissory note to which the defendant plead the general issue and set up a claim in reconvention.

A judgment was rendered for the plaintiffs in the court below, and the defendant appealed after having failed in his motion for a new trial.—On the appeal the appellees opposed to the claim in reconvention the plea of prescription.

Eastern District,  
December 1899

CHEW & RELF  
vs.  
KEANE.

*Workman* for appellant.

*Duncan and Relf* for appellees.

*Martin J.* delivered the opinion of the court.

The defendant, sued on his promissory note, pleaded *nil debet* and reconvened the plaintiff for several large sums. There was judgment for them for the amount of the note. The claim in reconvention was disallowed, and the defendant appealed after an unsuccessful attempt to obtain a new trial.

The appellees, in this court, opposed the plea of prescription to the appellant's claims in reconvention, and the latter, availing himself of the provision of the Code of Practice, 902, has prayed that the cause may be remanded to be tried on the plea of prescription.

We have considered that, as the case must be remanded, and it has appeared to us that the appellant ought to have succeeded on his application for a rehearing, at least as to an item of his claim. Justice will be better obtained by the case being sent back for a new trial.

An item in the claim of reconvention is for the value of certain slaves of the defendant, consigned to and sold by the plaintiffs to Foley Lezano, who had proven insolvent. Remuneration was claimed on account of the gross neglect of the plaintiffs, who sold these slaves without the customary caution of reserving a mortgage for the price, and by requiring some other security also. It is in evidence that, in the sale of slaves, such caution is never omitted, unless the buyer be of the very first standing and credit; and it is in evidence the vendors were persons of a very different description.

If the plea of prescription be pleaded in the Supreme Court, the party to whom it is opposed may demand that the cause be remanded for trial upon that plea—but if it appear that substantial justice has not been done a new trial will be ordered.

The district judge has deemed, it was to be presumed, the

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CHEW & BELP  
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plaintiffs would not have sold these slaves to persons whom they had reason to suppose could not pay for them.-

In our opinion, the defendant having shewn that the customary caution in the sale of slaves, is to require a mortgage and security, unless the buyer be a person of the highest standing and credit, and the buyers were persons of different description, the plaintiffs ought to have known that the persons sold to were proper persons to be trusted.

As the other items, although the defendant's right is not equally so obvious, we think they are worthy of reconsideration.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the case remanded for a new trial—and on the plea of prescription—the appellee paying costs in this court.

#### *WILLIAMS vs. HEGAN & CO.*

##### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A notarial act has no effect against third persons but from the date of its registry.

This was an action to rescind the sale of certain slaves, made to the defendants by one Kimball. It appeared from the testimony, that the plaintiff sold the slaves to Kimball in the State of Mississippi, on the 8th of September, 1828. Kimball paid a part of the price, and gave a draft for the remainder which was protested. In the act of sale, it was stipulated that if Kimball failed to comply with his agreement, the bargain should be void, and that the act of sale should be left in the hands of a third person, until Kimball should produce the plaintiff's receipt for the whole of the purchase money.

The slaves were delivered to Kimball, who brought them to New-Orleans, and on the 19th of February, 1829, sold

|     |     |
|-----|-----|
| 2   | 122 |
| 125 | 160 |
| 125 | 104 |

them to the defendants.—On the day after, they were attached in the possession of the defendants at the suit of the plaintiff.—It further appeared that Kimball was indebted to the defendants, and had absconded with the slaves from the State of Mississippi.

*Eastern District,  
December 1829.*

  
WILLIAMS  
vs.  
HAGAN & AL.

To establish the fact, that the defendants purchased with a knowledge of the circumstances, the plaintiff put to the defendants an interrogatory, requiring them to state whether they did not, previous to the 19th of February, 1829, receive a letter from the plaintiff, informing them that the slaves were supposed to have been run off by Kimball, and that he, the plaintiff, had a claim on them. The defendants answered, that they had some recollection of receiving such a letter, but having no acquaintance with the plaintiff, supposed it had been addressed to them by mistake. That they did not remember the contents, and that they purchased the slaves of Kimball without the knowledge of any claim upon them. The bill of sale from Kimball to the defendants, was not recorded until after the levy of plaintiff's attachment. The court below gave judgment for the defendants and the plaintiff appealed.

*Preston*, for appellant, contended :

1. By the bill of sale from Williams to Kimball, the latter acquired no title to the slaves in controversy, until payment of their price, and, therefore, could convey none.

2. Kimball concealed said slaves and absconded with them from the State of Mississippi—such a possession in the State of Louisiana can give him no right to dispose of them.

3. The defendants were warned of Williams' claim, and it was gross negligence on their part to forget it.

4. The sale was not recorded in the Register of Conveyances' office, until after the attachment, and, therefore, the property in the slaves was not transferred as to third persons.

*Moreau's Digest*, 2d vol. p. 305, sec. 5. *Martin's Digest*, 3d vol. p. 140, sec. 7.

Eastern District.  
December, 1850.

WILLIAMS  
vs.  
HAGAN & AL.

*Pierce contra.*

1. By the bill of sale from Williams to Kimball, the latter had transferred to him the property of the slaves in the State of Mississippi, and paid one half the price, and there was no condition suspending said transfer of property.

2. Kimball's running off with the slaves and the rest of his property from the State of Mississippi, has nothing to do in the controversy.

*Kenny et al. vs. Dow. 10th Martin 577.—Miles vs. Oden et al. 8th Martin, N.S. p. 214.*

3. The defendant's answer shows they had no warning, and there was no fraud.

4. The slaves were delivered to the defendants, and put in possession of a third person for them.

5. It is shown there have been mortgages to the defendants in the State of Mississippi, given to them by Kimball which has nothing to do with the present case.

6. The registry was in the usual time—but the plaintiff is not the third person in contemplation of the law.

*Doubriere vs. Grillier's syndic, 2 Martin, N. S. p. 171, 6 Martin, N. S. p. 325.*

This is a suit to set aside the conveyance from Kimball. This cannot be done without making Kimball a party.

*Martin J.* delivered the opinion of the court.

The plaintiff states that he attached several slaves, the property of Kimball, his debtor, and that the defendants pretending to be the owners of them, prevailed on the sheriff to surrender them. The petition concludes with a prayer, that the defendants be desired to return them to the sheriff to be proceeded on, on the plaintiff's attachment.

The general issue was pleaded. There was judgment for the defendants, and the plaintiff appealed.

In this court, the appellee's counsel has endeavoured to shew title to the slaves under Kimball, and has produced a notarial act of sale—that by a bill of sale from the plaintiff to

Kimball, the latter had the property of the slaves transferred to him, in the State of Mississippi, having paid one half of the price, and the act contains no suspension of the transfer of the property—that Kimball running off with the slaves and all the rest of his property from that State, cannot affect the right of his vendees—that the evidence shows the latter had no knowledge of this, and acted without fraud—that the slaves were delivered to them, and placed in the possession of the persons in whose hands they were attached. The plaintiff, as to these slaves, is not a *third person* in the contemplation of the law. That the present is a suit to set aside a sale by Kimball, who is no party to the suit.

On the part of the appellant, it is contended that the appellees acquired no right, as to third persons, by the notarial act of sale, because it was not registered, after the attachment was actually levied on the slaves. 2 *Moreau's Digest*, 303 sec. 5.

It is clear the defendants and appellees can have no title, except that which result from their notarial act, and that does not give any as to *third persons*, but from the date of its registry. The plaintiff and appellant are such persons who have obtained a lien by attachment, with respect to the act of sale: "Third persons, with regard to a contract or judgment are all who were not parties to it." *Civil Code*, 3522, n. 32.

A notarial act has no effect against third persons but from the date of its registry.

Finally, the appellee's counsel says that a vendee must have a reasonable time to register his act of sale; that it was executed on the nineteenth of February, 1839, and the slaves were attached on the twentieth at noon—nothing on the record shews the date of the registry—and the appellees have not in any manner accounted for the delay. There was surely time to have had the act registered, as it was passed in the city in which the register's office is kept. Whether on a proper case being made out, we could relieve a vendee, will be a proper matter of consideration when such a case will be presented to us.

Eastern District,  
December 1839.

WILLIAMS  
vs.  
HAGAN & AL.

Eastern District,  
December, 1890

WILLIAMS  
vs.  
HAGAN & AL.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding to give such a judgment, as in our opinion ought to have been rendered below, it is ordered, adjudged and decreed, that the defendants surrender the slaves named in the petition, viz.: Aberdeen, Wiley and Cressey, to the sheriff of the parish of New-Orleans, to be by him dealt with according to law, and the process issued by the present plaintiffs against Kimball; the appellees paying costs in this and the court below.

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**FRANKLIN vs. THE SYNDICS OF WARFIELD**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

A party has a right to bring forward at any time before the filing of the tableau of distribution and its homologation, all claims in virtue of which he has become creditor since the rendition of the judgment, on demands which existed previous thereto—and for this purpose may file a supplemental petition.

This action was first instituted in the Parish Court, and after cession of goods by the defendant Warfield, was transferred to the District Court, wherein proceedings had been instituted by the insolvent. The object of the suit in the first instance was to dissolve a partnership which existed between the plaintiff and defendant in relation to their business as *Innkeepers*, and to obtain a settlement of their accounts.

After the judgment of the Court *aguo* fixing the sum due to the plaintiff, as solvent partner of the firm of Franklin & Warfield, and before the parties had proceeded to make a partition of the partnership stock as prayed for in the original petition. The plaintiff filed a supplemental petition, alleging that he had, as solvent partner, since the rendition of the judgment, paid with his private funds, the further sum of \$2,257, partnership debts, and praying that said sum be allowed as a further credit against the partnership, that he have judgment for the same, and that a final partition of the partnership stock, then sequestered in the hands of the sheriff be made between the parties.



To this the defendant filed an exception, praying that the supplemental petition be set aside, on the ground that none could be filed after judgment. The Court below sustained the objection, and the plaintiff appealed.

*Nixon* for appellant.

*Hennan* for appellee

*Porter, J.*, delivered the opinion of the court.

This suit commenced originally in the Parish Court, and had for object to dissolve a partnership which existed between the plaintiff and insolvent in relation to their business as inn-keepers. But the latter having failed since the inception of the action, it has been transferred to the District Court, and cumulated with the proceeding in *concurso*.

There have been two appeals brought before this Court from the proceedings in relation to the estate. The first was from a decision of the inferior tribunal in relation to the claim of one McCall, who asserted a right to specific property found in the insolvent's possession at his failure. The Court versed the judgment rendered below, and remanded the cause for further proceeding, but at the same time confirmed that part of the judgment which established the debt due to the plaintiff by the insolvent.

The case came up again, on a right set up by the plaintiff, as partner, to have the possession of the one half of the property, which was found in the insolvent's hands when he failed. The Court under the circumstances of the case, thought that the Syndic was entitled to it, and dismissed the appeal with the expression of its opinion, that the plaintiff could exercise all his rights against the Syndic who represents the estate.

While the cause was thus pending in the Court below, and before a tableau of distribution was filed, the plaintiff filed a supplemental petition, in which he stated that since the rendition of the judgment in his favor, he had, as partner of the house of Franklin & Warfield, paid further claims on

Eastern District.  
December, 1890.

FRANKLIN  
&  
WARFIELD.

Eastern District,  
December 1880.

FRANKLIN  
vs.  
WARFIELD.

A party has a right to bring forward at any time before the filing of the tableau of distribution and its homologation, all claims in virtue of which he has become creditor since the rendition of the judgment on demands which existed previous thereto—and for this purpose may file a supplemental petition.

said firm to the amount of \$2257 89, for which he prayed judgment against the estate.

The Counsel for the Syndic pleaded an exception, that no supplemental petition could be filed after judgment on appeal. The Court sustained the exception, and the plaintiff appealed.

It is beyond doubt that the plaintiff has a right to bring forward at any time before the filing of the tableau of distribution and its homologation, all claims in virtue of which he has become creditor, since the rendition of the judgment or demands which existed previous thereto. The first decree only operated as *res judicata* on the matters embraced by it. And whether he called his petition a supplemental or an original one, is in our opinion immaterial. His case was still pending in *concurso*, and we do not perceive the error of his styling his petition a supplemental one. It certainly was such in relation to his claim against the estate. It was an addition to his first demand.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the exception filed in the cause be overruled, and the cause be remanded to be proceeded in according to law; the appellee paying the costs of the appeal.

*LIGON vs. ORLEANS NAVIGATION COMPANY.*

APPEAL FROM THE COURT OF THE PARISH OF THE CITY  
OF NEW-ORLEANS.

A party is entitled to recover when he has paid in error.

The plaintiff, owner of the schooner *Mayflower*, brought this suit to recover from the defendants the sum of \$1025, being the excess of tonnage fees imposed upon the vessel. It appeared, from the evidence, that the schooner was of twelve tons, and had been rated by the defendants at eighteen, and at that rate paid by the plaintiff. He obtained a judgment for the excess, and the defendants appealed.

*Workman* for appellant. *Preston* for appellee. •

*Martin, J.*, delivered the opinion of the court.

Eastern District,  
December 1830.

LIGON  
vs.  
ORLEANS NAVI-  
GATION CO.

The plaintiff alleges he is the owner of a schooner of the burden of twelve and forty-seven ninety-fifths tons, with which he has navigated the Bayou St. John, and the defendants' canal, and has been charged with, and has actually paid them, a toll or tonnage on eighteen tons, the said schooner being on their books as of that tonnage, and the plaintiff, through error, has paid toll accordingly, for one hundred and sixty-one trips.—A claim was accordingly urged for the excess.

The general issue was pleaded.

The plaintiff had a verdict and judgment for \$1459. The defendants made an unsuccessful effort to obtain a new trial and appealed.

Their counsel has urged in this court, that the verdict and judgment are contrary to law and evidence.

It appears the schooner was but of 12 47-95 tons burden, when the plaintiff began the navigation, on which he paid toll to the defendants, and that she was still of that burden, and no more, when he ceased to do so—but it is in evidence she underwent several repairs, in the meanwhile, and that sometimes a greater tonnage is given to vessels undergoing repairs. From this the defendants and appellants' counsel has urged, that the plaintiff ought to have shown that the repairs made to the schooner did not increase her tonnage, and subsequent repairs did not add to her original burden.

A party is entitled to recover when he has paid in error.

It does not appear to us that there is any thing in this objection. The fact being established that a higher toll was paid than the defendants were entitled to, we do not think the jury erred, in concluding the plaintiff paid under an error, and if so, the law is that he is entitled to recover.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs in both courts.

## CASES IN THE SUPREME COURT.

Eastern District.  
December 1890.

CALDWELL  
vs.  
FALES.

## CALDWELL vs. FALES

## APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If the cause be tried without issue joined, the judgment will be reversed.

A supplemental petition was filed in this case, to which the defendant did not answer. The cause was submitted to a jury who found a verdict for the plaintiff, and the defendant appealed.

*Hennen*, for appellant.

1. The judgment was rendered without issue, being joined, no answer having been filed to the amended petition of plaintiff. 2 *Martin*, N. S. P. 256; 8 *Martin*, N. S. P. 297.

*Eustis* contra.

1. No new trial was asked for in the court.

2. The evidence supports the verdict, and the judgment must be confirmed with damages and costs.

*Martin J.* delivered the opinion of the court.

The defendants and appellants assign, as error apparent on the face of the record, that judgment was rendered without issue having been joined—the plaintiff having, with leave of the court, amended his petition, and the defendant having filed no answer thereto.

The appellee's points are, that no new trial was asked, and the evidence supports the verdict.

If the cause be  
tried without is-  
sue joined, the  
judgment will be  
reversed.

This is certainly no answer to the assignment of error, and the judgment must be reversed. *Freeland vs. Lanfear*. 2 *Martin*, N. S. 256. *Hughes vs. Harrison*, 8 *Martin*, N. S. 292.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside and the case remanded for further proceedings, the appellee paying costs in this court

## SAUL ET AL vs. SEE'S CURATOR.

## APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If the sheriff returns that a witness is not to be found, the party praying

the continuance on that account, must show that he is a resident of the Eastern District. parish, or that he took steps to obtain his deposition. *January 1881.*

In this case a witness had been subpoenaed by the defendant, and the return of the sheriff showed that he could not be found. A continuance was then prayed for on the affidavit of the defendant's counsel, setting forth that subsequent to the institution of the suit, he had been employed by the intestate, who informed him of certain facts which he expected to prove by Chazel, the absent witness, who was overseer of the Orleans Navigation Company. The affidavit set forth the facts which the witness was expected to disclose. The Court refused to grant the continuance, on the grounds; 1st. That due diligence had not been used, the curator having taken no steps to ascertain whether the witness resided in the parish, or whether his testimony was material. 2d. That the intestate might have been mistaken in his opinion as to the materiality of the testimony.

SAUL ET AL  
vs.  
SEE'S CURATOR.

There was judgment for the plaintiff, and the defendant appealed.

*Martin J.*, delivered the opinion of the court.

The defendant and appellant complains that a discontinuance was improperly refused him below.

It was proved on the affidavit of Lockett, who deposed he was employed by the intestate to defend him, and was informed by him that Chazel was a material witness in his behalf. The affiant stated the facts which the intestate said he expected to prove by this witness, and they appeared material.

A subpoena was taken out for the witness, and the sheriff returned he could not be found.

From the sheriff's return we must conclude that he was not informed of the witness' place of residence, or that he had none in the parish.

In the first case, the defendant was in fault in neglecting to give the requisite information to the sheriff; in the latter, his deposition ought to have been taken.

If the sheriff returns that the witness is not to be found, the party praying for a continuance on that account, must show that he is a resident of the parish, or that he took steps to obtain his deposition.

Eastern District.  
January 1831.

SAUL ET AL.  
vs.

SEN'S CURATOR.

21 132  
47 740  
2 132  
114 894

We think the District Court did not err.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

*SMITH'S HEIRS vs BLUNT.*

APPEAL FROM THE COURT OF THE THIRD DISTRICT, THE  
JUDGE THEREOF PRESIDING.

Nullity does not result from the failure to annex copies of authentic acts to a petition.

The affidavit required when the mortgagee proceeds by the *via executiva* against a third possessor, is not required in the *Juicio ordinario*.

The plaintiffs set forth in their petition, that certain slaves upon which they had a mortgage, had come by purchase or otherwise, into the hands of the defendant, who claimed them as owner and third possessor. That they had instituted proceedings against the defendant, preparatory to having seizure and sale of the slaves, and caused the necessary notices to be served on the heirs of the original debtor, and also on the defendant, but that before the order was granted, the defendant had caused the slaves to be removed without the jurisdiction of the court. They prayed that the defendant be ordered to bring back the slaves and surrender them on the order of seizure, or decreed to pay the amount due on the mortgage. The court below dismissed the suit on the exception taken by the defendant. That the plaintiffs had not annexed to their petition an affidavit that the debt was due and unpaid, and the demand and notices served upon the heirs of the original debtor and upon the defendant, although the plaintiff alleged that the necessary notices and affidavit were made in the original proceedings for order of seizure and sale, and offered to shew the same on the trial of the cause. From this judgment the plaintiffs appealed.

*Pierce* for appellant. *Downs* for appellee.

*Porter J.* delivered the opinion of the court.

The petitioner states that he has a mortgage on certain

slaves, once the property of Henry Sterling, which came into the possession of the defendant by purchase or otherwise, and that he claimed them as third possessor.

That he instituted proceedings against the defendant, preparatory to the seizure and sale of the slaves, but before the order was granted he removed them out of the jurisdiction of the court, and prevented the execution from being carried into effect.

The petition concludes by a prayer that the defendant may be compelled to bring the property back, or pay the amount due on the mortgages.

A variety of exceptions were filed to the petition. Several of them are so devoid even of plausibility, that no argument has been offered in support of them, and the time of this court is too much required for matters demanding all its attention, to be occupied in setting out such objections at length and demonstrating their incorrectness. There are two, however, which require attention :

One is, that the authentic and public acts on which the action is brought, are not filed with the petition. *Code of Practice*, 174.

The other is, that the plaintiffs have not in their petition made oath that the debt is really due and unpaid, and that payment has been in vain demanded of the debtor, 30 days before bringing the suit. *Brussard vs. Phillips*, 6 N.S. 309. *Code of Practice*, 68, 69, 70.

On the first point we are of opinion that, even under the Code of Practice, nullity does not result from the failure to annex copies of authentic acts to a petition. It is true the code uses the word *must*, but that expression must be construed in relation to the subject matter, and so as to carry into effect what must be believed the intention of the law maker. There are various passages in the code where this term is used, and where no such consequence as is contended for in this instance can follow the failure to adopt it. We

Eastern District,  
January 1831.

SMITH  
vs.  
BLUNT.

Nullity does not result from the failure to annex copies of authentic acts to a petition.

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January 1881.

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take one which presents itself on the same page, which contains the 174 article cited in argument. The 172 article, sect. 4, declares that a petition *must not contain insulting or impertinent expressions*. Pleadings containing offensive matter of this kind, would not be null and of no effect. The remedy would be to have the improper language stricken out at the costs of the party using it. Leaving that which was correct and decorous, to have its legal effect. So in the instance before us, we cannot think it was the intention of the legislature to have a petition dismissed, because the plaintiff neglected to file copies of authentic acts. That conclusion could only be reached, by considering the petition an absolute nullity, without them. This the law maker has not said; and in the construction of statutes, courts always require such a declaration, from the legislature, or a belief in the legislative intention, arising from the particular character of the enactment, to enable them to pronounce acts null and void. That intention is not believed to exist here, because the latter part of the article shews us, the object of it is to enable the defendant to examine the copies of the acts, if he should require it. Now the object of this legislation is effectually obtained, by securing to the defendant the right of refusing to answer until the documents on which the action is based are filed with the petition.

The next objection is, that in which we have been given to understand the judgment of dismissal was rendered below, and it is, that the plaintiffs have not annexed to their petition an oath that the debt is justly due and unpaid, and that payment has been in vain demanded, thirty days before bringing suit.

This decision of the inferior tribunal has proceeded from the judge confounding two modes of proceeding, entirely distinct in our jurisprudence, and by having taken the rules furnished for correcting one action, and having applied them to another, to which they ought not, and cannot



have any application. In the *via executiva* where an order of seizure and sale issues on the showing of one party, without hearing the other, the law requires a strong *prima facie* case. Documents clothed with the highest degree of authority: the oath of the party that the money is due; and in the case of a third possessor, the declaration of the creditor that he has, thirty days before, demanded the money from the principal debtor. In the *juicio ordinario*, when the defendant is cited, heard, and judgment rendered after issue joined, there is no necessity for these precautions *in limine litis*. Indeed the oath of the creditor would be mere superogation. It could not add to his right, nor prove it. The court, therefore, erred in sustaining the exception. Such of the matters as were necessary to the plaintiff's right of recovery, might have been shewn on the trial, and did not require the oath of the creditor on filing the petition.

Of these matters, a demand made thirty days previous to the institution of the suit was one. This is a condition precedent to the right of a mortgage creditor to recover from the third possessor, and it was because no such demand was proved *on the trial* in the case of *Broussard vs. Phillips*, cited by the appellee, that judgment was rendered against the petitioner.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, that the exceptions be overruled, and the cause remanded to be proceeded in according to law, the appellee paying the costs of appeal.

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CHew ET AL. vs. McDERMOTT.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,  
THE JUDGE THEREOF PRESIDING.

The plaintiff must seek redress by personal action against the co-heir or his representative, before he can attack the third possessor.

This was an action by the heirs to compel the vendee of

Eastern District.  
January 1881.

SMITH  
vs.  
BLUNL.

The affidavit required when the mortgage proceeds by the *via executiva* against a third possessor is not required in the *juicio ordinario*.

Eastern District.  
January 1831.

CHew ET AL.  
vs.  
M'DERMOTT,

a co-heir to contribute to the payment of a debt for which the estate in his possession had been mortgaged by the ancestor.

Their was judgment for the defendant and the plaintiffs appealed.

*Porter, J.*, delivered the opinion of the Court.

The petition states, that one Samuel Chew died in the year 1820, and by his last will and testament, acknowledged he had sold part of his estate to his son Edward R. Chew, and bequeathed the remaining portion of his estate to his said son, and to his wife Nancy Chew, and his daughter Sarah Ann Chew.

That the wife and daughter have since died intestate, leaving the petitioners and Edward R. Chew, their forced heirs, and that the property so bequeathed was liable to a mortgage to one Johnson.

That the property received by the petitioners has been made liable for the mortgage deed : that the defendant has part of the property left by Samuel Chew, which she acquired by a sale from Edward R. Chew, the son, and that this property ought to contribute in a *pro rata* proportion to the discharge of the mortgage which incumbered it equally with that received by the petitioners.

The petition concludes with a prayer, that the defendant may be condemned to pay the proportion of the mortgage debt, according to the value of the property in her hands.

The answer denies the liability, and asserts that one of the slaves now held by the defendant, is in litigation, and that no contribution should be made for this portion until her title is secured.

It further avers, that the petitioners as heirs were bound for the debts of Samuel Chew, deceased, and consequently are obliged to indemnify their possessors, who have acquired property from the heirs, from any claim against the estate of Chew, from whom they inherited.

The court of the first instance gave judgment against the petitioners, and they appealed.

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January 1881.

CHEW ET AL.  
vs.  
M'DERMOTT.

It makes a part of the statement of facts, that Edward R. Chew, under whom the defendant claims title, has died since the inception of this suit. If the plaintiffs are his heirs, this action could not be sustained, for their responsibility, as his representatives, would destroy their right to attack and annul his acts. But the record does not give explicit information on this head. The case may then be considered as on the allegations of the petition, and they present the question, whether property mortgaged for the debts of the ancestor, which is in the hands of a purchaser, from one of the heirs, can be made contribute at the suit of the co-heirs to the discharge of the mortgage debts, or to the reimbursement of the money paid by them in discharge of such debts. That question we do not find it necessary now to decide : being of opinion, that at all events, the plaintiffs must first seek redress by personal action against the co-heir or his representatives, before they can attack the third possessor. This doctrine appears to us results from the 1382d, 1384th and 1386th articles of the *Louisiana Code*.

The plaintiff must seek redress by personal action against the co-heir or his representative, before he can attack the third possessor

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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PAXTON vs. COBB.

A judgment obtained by the fraudulent representations of the plaintiff's attorney is void.

In such an action the defendant is not driven to a distinct action, but may demand the nullity whenever it is sought to be enforced

The authority of the attorney is not restricted to the mere prosecution of the suit, but extends to every thing necessary for the protection of the interests intrusted to his care.

If he dismiss the action it is within the scope of his authority, and the plaintiff is bound by his acts.

The plaintiff obtained a judgment against Mary Cobb, one

*Eastern District.*  
*January 1831*

**PAXTON**  
**vs.**  
**COBB.**

|      |      |      |
|------|------|------|
|      | 21   | 138  |
|      | 47   | 1649 |
|      | 2    | 138  |
|      | 1120 | 162  |
| 2    |      | 138  |
| e122 |      | 470  |

of the defendants, for a slave, and having failed in his efforts to get possession, brought this suit to recover the value and hire.

The answer set up the following grounds of defence :

1. That the judgment was null and void for want of the reasons upon which it was rendered.
2. That she had a good and legal defence, which would have been made but for the fraudulent representations of the plaintiff's attorney.

The answer contained a plea in reconvention, and a demand that the judgment be declared null and void. It appeared that the plaintiff took a judgment by default on the 19th June, 1825, which was made final on the 22d, no opposition being made thereto."

On the trial, the defendant proved that the plaintiff's attorney assured her if she would disclaim title to the slave, the suit should be discontinued as regarded her : That she did disclaim, notwithstanding which the judgment was obtained as above stated. The cause was tried by a jury, who found for the defendant, and the plaintiff appealed.

*Morgan* for appellant,

*Lawrence* for appellee.

*Porter, J.*, delivered the opinion of the court.

The plaintiff states that he heretofore recovered a judgment against one of the defendants, Mary Cobb, and a certain Henry Roach, by which they were decreed to deliver up possession of a slave to him: That he had demanded the property, and cannot get it : that he has issued a writ of possession which has been unavailing. He further states, that he believes the defendant has removed the slave out of the jurisdiction of the court and the reach of its process, to defeat the judgment. He prays for judgment against the defendants for the value of the property, and for the use of it since the time it should have been delivered up.

The defendant denies the allegations, except so far as they

relate to the judgment, and that judgment she avers to be null and void as to her, because it was not clothed with the forms required by the constitution to render it binding: and, second, because it was obtained through the fraudulent practices of the attorney of the plaintiff. She reconvenes the plaintiff and prays that the judgment rendered against her be declared a nullity, and that she recover the sum of three hundred dollars, the damage sustained by her in consequence of the fraud practised by the petitioner.

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January 1881

PAKTON  
VS.  
COBB.

The cause was submitted to a jury, who found for the defendant. The plaintiff appealed.

It was proved that after the suit was commenced, the attorney for the petitioner told the defendant, that if she would renounce all claim to the slave in question, he would dismiss the suit as against her. That she then said, that the slave was not in her possession, and that she had no right to her. Notwithstanding the promise, he proceeded and obtained judgment against her.

Such conduct was fraudulent on the part of the attorney, and brings the case within the provisions of the Code of Practice in relation to the nullity of judgments.

A judgment obtained by the fraudulent representations of the plaintiff's attorney is void.

There are two objections in the case which require observations from the court.

The *first* is, whether the nullity can be affected by way of exception or defence, or can be pleaded in reconvention? and, the *second*, if it can, is the client responsible for a fraud or deceit of this kind; on the part of his attorney?

The Code of Practice does not speak of the nullity of judgments being offered as an exception, and directs that suit shall be brought to set them aside. But we believe it is a general rule in jurisprudence, that wherever a man may sue, he can except, when the matter which he might have annulled in an action, is presented as the basis of a demand against him. The proposition seems to us as true in law as in morals, that what you have a right to attack and destroy,

In such a case the defendant is not driven to a distinct action, but may demand the nullity whenever it is sought to be enforced,

Eastern District.  
January, 1831.

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COBB,

The authority of the attorney is not restricted to the mere prosecution of the suit, but extends to every thing necessary for the protection of the interests intrusted to his care

you may resist when it is used as a means of injuring you. Were it otherwise, and the defendant was driven to a distinct action, then the spectacle might be presented, of the same court trying two causes between the same parties in immediate succession, in which the judgment would be contradictory, and contrary to each other. In the one, the plaintiff would recover in virtue of his judgment. In the other, that judgment would be declared null and of no effect.

On the other ground, the want of authority in the attorney to dismiss the action against one of the defendants, or to enter into an agreement to do so. It was urged, that the authority of the attorney extended to commence suit and carry it on to final judgment. That he was empowered to do every thing necessary to accomplish these objects, but that when he engaged not to prosecute the suit, he was acting beyond the scope of his duties, and his acts were not binding on his clients. This argument is ingenious enough, but we think it is defective in limiting, too strictly, the power of the attorney. His authority, in our judgment, extends to every thing necessary to the protection and promotion of the interests intrusted to his care, so far as they are to be affected by the proceedings in the court where he represents his client. In order that his services may be useful, more must be entrusted to him than the mere prosecution of the suit. If he was restricted, as is contended, then were his client not present in court, he might be compelled to sacrifice the interests of his principal, by putting his case into court on defective evidence—he could not take a nonsuit. In a case where there were several defendants, and he discovered, in the progress of the cause, that it was important to the interests of the client to use one of them as a witness, he could not obtain his evidence by dismissing the action against him, and proceeding against the others. We cannot distinguish such cases as these from that now before us. It is frequently as necessary for the interests and safety of the

client, that the attorney should have the power to recede as to advance—to dismiss, as to prosecute. The necessity of doing one or the other frequently arises in a moment when consultation is impossible, hence the necessity of vesting discretion in counsel. What were the motives that induced the attorney to make the agreement in question with the defendant, and what tempted him to break it, we do not know, and probably never will, as the death of the agent prevents him giving any explanation of his conduct. But be the motives what they may, it was within the scope of his authority to dismiss the action, and the plaintiff is bound by his acts.

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January 1881.

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vs.  
COBB.

If he dismiss the action it is within the scope of his authority, and the plaintiff is bound by his acts.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

**GOSSLINS LEGATEES vs. HER LEGITIMATE HEIRS.**

**APPEAL FROM THE COURT OF PROBATES FOR THE  
PARISH AND CITY OF NEW-ORLEANS.**

No appeal lies in behalf of universal legatees from a rule directing the executor to pay into the treasury the balance in his hands.

The executor appealed from a decree of the Court of Probates, which directed him to pay to the defendants, the money in his hands, belonging to the estate of their ancestor. Pending this appeal the defendants took a rule on him, to show cause why the money should not be deposited in the hands of the Register of Wills. The rule was made absolute, and its performance enforced by a writ of distringas. Before the payment of the money into the treasury, the plaintiffs took a rule on the defendants to show cause, why the writ of distringas should not be set aside. The court below was of opinion that the legatees had no right to interfere in a matter between the court and executor, and discharged the rule, from which judgment the legatees appealed.

*Seghers* for appellant.

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vs.  
HER HEIRS.

*Dennis and Derbigny* for appellees, contended—That an appeal would not lie from such an order, and cited C. C. art. 1666, 1668 and 7th Martin N. S. 457.

*Martin J.* delivered the opinion of the court.

The defendant having appealed from a decree of the Court of Probates, which decreed him to pay the balance in his hands, as executor of their ancestor, to them—they obtained a rule on which he was decreed to pay it into the Treasury of the State, the execution of which was enforced by a writ of distringas.

The universal legatees, before the balance was paid into the treasury, moved to have the writ of distringas set aside; their motion was disallowed and they appealed.

No appeal lies in behalf of universal legatees from a rule directing the executor to pay into the treasury the balance in his hands.

This case has come before us, on motion, for a mandamus, for an appeal of these legatees from the order to the executor to pay the balance into the treasury, and we declined granting the mandamus, on the ground that the case did not present one on which the appellants sustained an irreparable injury by the judgment from which they wished to appeal.

The present appeal is from the refusal of the Court of Probates to forbear carrying that judgment into effect. It is clear, that the reasons that induced us to decline granting the mandamus, militate with equal force against our sustaining the present.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

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CHISOLM ET AL. vs. SKILLMAN.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,  
THE JUDGE OF THE EIGHTH PRESIDING.

The under tutor is the proper person to maintain an action for the recovery of minors property, which was sold to satisfy the debts of the mother.

The minor who has reached the age of majority during the pendency of the



action, may make himself a party, but the mother cannot supply the place of Eastern District, the under tutor. January, 1881

CHISOLM  
vs.  
SKILLMAN.

This suit was brought in the name of the heirs of Doyle' assisted and represented by Chisolm, their under tutor, to recover two slaves in the possession of the defendant, which the latter had caused to be seized and sold, to satisfy a judgment he had obtained against the mother and tutrix, in her individual capacity. There was also a prayer for damages. The defendant excepted to the petition, on the ground that no action could be maintained in the name of a minor under tutorship; —, the tutor, acting for the minor without making him a party.

The exception was overruled, an answer put into the merits, and the cause submitted to a jury. After the plaintiff had read his petition, and before the introduction of any testimony, the defendant required the written opinion of the court upon a question of law, *to wit*.—Can an under tutor commence and carry on suit in behalf of minors, to recover damages from any one not the tutor. The court decided that the question submitted had already been made and overruled in the defendant's exception. That the case was now before the jury, who were judges of the law as well as the evidence, and that in order to entitle the plaintiff to a verdict, he must shew his right to maintain the action. The jury found for the plaintiff, and the defendant prayed for a new trial upon the following grounds—1st, The court erred in overruling the defendant's exception to the competency of the plaintiff to institute the suit in the character of under tutor. 2d, Because the verdict of the jury is contrary to law, two of the minors, whose under tutor plaintiff represented himself to be, being over the age of puberty and not legally represented in the suit. A new trial was awarded, and a second verdict found for the plaintiff, but somewhat varying from the first.

The defendant prayed for a new trial, on the following

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grounds : 1st. The verdict of the jury is erroneous, in finding any thing for the plaintiff for the two Doyles, over the age of puberty. 2d; The verdict of the jury is erroneous in fixing a value upon the slave, and finding that the defendant should pay a fixed sum as half her value. 3d, The verdict should have been in favour of the defendant, on account of a total want of authority in the plaintiff to maintain the suit. A new trial was again ordered, and at the ensuing term of the court, the plaintiff filed a supplemental petition, setting forth, "that doubts had arisen as to the propriety of prosecuting the suit in the name of the under tutor, and praying that the mother, as natural tutrix, and one of the minors, who was then of age, might be made real and nominal plaintiffs." The defendant opposed the filing of the amended petition on the grounds : 1st, Because amendments can only be asked for by parties who are legally in court. 2d, Because the right to dismiss is a legal right given to plaintiffs, but the law does not authorise a plaintiff to quit an action by substituting another in his place. 3d, Because the action being bad in its creation for want of a legal plaintiff, cannot afterwards legally be made good by substituting another and a new plaintiff.

The court permitted the plaintiff to file the petition upon payment of costs. There was a verdict and judgment for the plaintiff, and the defendant appealed.

*Turner* for appellant. *Harralson* for appellee.

*Porter J.* delivered the opinion of the court.

This action was commenced in the name of the under tutor of the heirs. The petition states that the defendant, to enforce a judgment against the mother and tutrix, had seized, sold, and by virtue of a purchase made by him at sheriff's sale, retained in his possession two slaves, one of which was the property of the father of the minors, and the other was community property between the father and tutrix. It concluded by a prayer for restitution of the property and damages.

The defendant filed an exception to the petition ; viz. : Eastern District,  
that the action could not be maintained in the name of the January 1821.  
under tutor. The court overruled it, and on an answer  
being put in on the merits, the cause was submitted to a jury, CHISOLM ET AL.  
who found for the plaintiffs. The verdict, however, was set vs.  
aside, and a new trial granted. This new trial had nearly SKILLMAN.  
a similar result; the finding varied a little, but was substantially for the plaintiffs. The court granted another trial, but before it took place, certain proceedings were had, which it becomes necessary to state. They are very novel.

We cannot gather from the record, why the court granted the new trial. It could scarcely be, because the under tutor had not authority, after the judge had decided he was clothed with it : yet some presumption is created, that it was for this cause; for we find it always stated by the defendant, as one of his grounds for a new examination of the case. And though it may be true this was not the cause, and that he was unable to convince the court, it appears he succeeded in shaking the faith of the plaintiffs; for the next thing we find on the record, is a supplemental petition, in which it is stated, "that doubts having arisen whether the under tutor could carry on the suit," one of the heirs, who was then of age, and the mother, "claim to be made real and nominal plaintiffs;" and they were so made, on payment of costs up to the time they presented themselves.

The defendant, who had such strong objections to the suit being carried on by the under tutor, and who in his exception first filed, had asserted, that the tutrix should have commenced the action, seems to have been seized with an equally strong aversion to her, the moment she made herself a party, and he excepted to the change in the pleadings, on the following grounds :

First, That it was changing the nature of the action and party plaintiff, and substituting authorised persons to carry

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on the same, in lieu of persons not authorised at the inception of the suit, to the great injury of the defendants.

Second, That the original action being totally without foundation for want of a plaintiff, there was nothing to amend by.

It is the duty (says our Code) of the under tutor, to act for the minors, whenever the interest of the minors is in opposition to the interests of the tutor. The question then is, was there such an opposition of interest in the present case? We think it is very clear there was. The property had been sold to pay the mother's debts. Title was set up under the sale, or in other words, under the mother. She was of course interested to defeat the action; for if judgment was rendered against the minors, her debt to Skillman remained satisfied, and she was furnished with an exception of *res judicata* against the claim of the minors, should they hereafter make a demand from her on account of this property. An exception which would prove a bar, if she legally represented them, unless they shewed the judgment had been obtained by fraud and collusion.

The under tutor is the proper person to maintain an action for the recovery of minor's property which was sold to satisfy the debts of the mother.

The minor who has reached the age of majority during the pendency of the action, may make himself a party, but the mother cannot supply the place of the under tutor.

If any amendment was necessary, therefore, to the pleadings, there was, in our judgment, enough to amend by. The suit was properly and legally commenced in the name of the under tutor, and there was no error in permitting the minor, who had reached the age of majority during its pendency, making himself a party to the action, his right to do so, being incontrovertible. But there was error in permitting the tutrix to take the place of the under tutor, and for that cause the judgment must be reversed. We have great reluctance to yield to this objection, after so many trials on the merits, but it cannot be got over. If the judgment had been adverse to the minors, they might have set it aside on the ground, that their mother could not represent them where she was interested. That which might not be binding on them, cannot be binding on others. This differs from the case where a party

voluntarily contracts with a person under age. Here the defendant objected to the mother becoming a party, and he did not voluntarily contest the case on the merits.

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It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that this case be remanded to said court, with directions to the judge, not to permit the mother and tutrix of the minor children, to be made a party to the suit; and it is further ordered and decreed, that the appellee pay the costs of this appeal.

**MARCHAND ET AL vs GRACIE.**

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH  
OF EAST BATON ROUGE.**

An executor who presents his account, and prays for a discharge, must cause the heirs to be cited.

There must be a plaintiff and defendant as well as judge, and an issue joined, to give a judgment the force of *res judicata*.

The plaintiffs were testamentary heirs of Joseph Marchand, who died in 1815, and of whom the defendant was executor.

They instituted suit in 1829, to compel the defendant to render an account. The defendant pleaded and exhibited a discharge, by the Probate Court, from his office of executor, in 1828.

The plaintiffs offered the petition and probate records, to shew that the discharge was an *ex parte* proceeding, and that the plaintiffs were minors unrepresented. The court rejected this evidence on the ground, that the order of discharge was a judgment or decree of the court, which was binding on all persons, until reversed by an appeal, or nullified by an action of nullity, and non-suited the plaintiffs, from which judgment this appeal was taken.

*Watts* for appellant, contended:

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**January 1881.**

**MARCHEAND ET**  
**AL. VS.**  
**GRACIE.**

1. That the judge erred, in rejecting the evidence to show that the plaintiffs were minors without tutors, &c. and were not parties when the defendant obtained his order of discharge as executor.

2. An order of discharge of an executor, by a court of probates, on an *ex-parte* liquidation of his accounts, constitutes no bar to an action to compel an account.

3. Such an order is a nullity in itself. Its nullity may be shewn when it is set up, and requires no appeal or previous action of nullity to neutralise it. It has no effect as to persons not parties.

*Porter J.* delivered the opinion of the court.

The defendant was executor of the last will and testament of the father of the petitioners, and this action is brought to compel him to render an account. He offered, as an exception to the action, the plea of *res judicata*. The Court of Probates sustained it, and the plaintiffs have appealed.

An executor who presents his account and prays for discharge, must cause the heirs to be cited.

The defendant was appointed executor in 1815, and rendered no account until 1828. When he did render it, it was presented to the parish judge, and by him accepted and homologated, without calling in the heirs, or any other persons of adverse interests, to the party presenting it.

There must be a plaintiff and defendant as well as judge, and an issue joined, to give a judgment the force of *res judicata*.

Such a proceeding has not the character of a judgment which enables him, in whose favour it is rendered, to plead *res judicata*. There must be a defendant and plaintiff, as well as judge, to give a decree of a court, that effect; and in addition there must be an issue expressly joined, or one implied by the law.

It is therefore ordered, adjudged and decreed, that the judgment of the Probate Court be annulled, avoided and reversed, that the exception of *res judicata* be overruled; and that the cause be remanded for further proceedings, the appellee paying costs of appeal.

*KEMPER vs. TURNER.*Eastern District.  
January 1881.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,

THE JUDGE OF THE FOURTH PRESIDING.

KEMPER  
vs.  
TURNER.

The record of a judgment against the agent is legal, though not conclusive evidence, of the settlement of a debt due to the principal.

The jury may correctly infer from the relation between the principal and agent, (they being brothers) and the long silence of the former, that the settlement was made with his consent, or was afterwards approved. In this instance, however, the cause was remanded.

This suit was brought to recover from the defendant the amount of a judgment which he had collected as attorney for the plaintiff. The defendant denied that the plaintiff had placed the claim in his hands, but averred that it was handed to him by Reuben Kemper (a brother of the plaintiff) with directions, when collected, to be placed to the credit of said Reuben, who was indebted to the respondent, and that it was so applied.

On the part of the plaintiff, it was proved that the defendant, as his attorney, received the amount of the judgment in 1817. To prove the defence set up, the plaintiff was interrogated as to the agency of Reuben Kemper. He answered that the latter once had the claim in his possession as agent, but had returned it to plaintiff, who gave it to the defendant for collection. The defendant then introduced the record of a suit filed in 1820, in which he, the defendant, was plaintiff, and Reuben Kemper defendant, wherein it appeared that the defendant had credited said Reuben, with the amount of the judgment now sued for. To the introduction of this record, the plaintiff objected, on the ground that it was *res inter alios acta*, but the objection was overruled and the plaintiff excepted. It was further shown that in 1813-16, Reuben Kemper acted as the agent of the plaintiff in various transactions. There was judgment for the defendant, and the plaintiff appealed.

*Carleton and Lockett* for appellant. *Turner* for appellee.

*Martin J.* delivered the opinion of the court.

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vs.  
TURNER.

The defendant sued for the amount of a judgment obtained by him for the plaintiff, rested his defence on a credit given therefore to the plaintiff's brother, from whose hands, he alleged the claim sued on had been received for collection.

There was judgment for the defendant, and the plaintiff appealed after an unsuccessful attempt to obtain a new trial.

Our attention is first drawn to a bill of exceptions taken by the appellant's counsel, to the opinion of the District Court, in permitting the record of a suit of the appellee against the appellant's brother, in which the latter gave credit for the amount of the judgment.

The appellee had interrogated the appellant on the agency of the brother; and it had been denied. To destroy the evidence resulting from the appellant's answer, the appellee had introduced a witness, and sought, by a chain of testimony, to establish the appellant's knowledge of and assent to the acts of the brother. It therefore became important to establish a settlement with the brother, and of this special fact a judgment against the latter was legal evidence.

We think the record was properly admitted as legal, but not conclusive evidence, against the appellant.

The record of a judgment against the agent is legal, though not conclusive evidence, of the settlement of a debt due to the principal.

The jury may correctly infer from the relation between the principal and agent (they being brothers) and the long silence of the former, that the settlement was made with his consent, or was afterwards approved. In this instance, however, the cause was remanded.

On the merits, although we are not ready to admit, having already held the contrary, that credit given to the agent dissolves the principal's debt. The jury may have correctly inferred from the relation between the principal and agent, the conduct and long silence of the former, that if this mode of settlement was not made with the principal's knowledge and consent, it was afterwards approved.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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This case is now before us on a rehearing.

When we acted on it before, we thought, that although we were not ready to admit (having already held a contrary



doctrine,) that credit given to the agent extinguishes the debt of the principal, the jury might readily have inferred, from the relation existing between the principal and agent in the present case (they being brothers), and the conduct of the principal, and his long silence and apparent acquiescence, that if the settlement effected by the agent was not made with the principal's consent or knowledge, it was afterwards approved by him. On reviewing this opinion, we have come to the conclusion, that justice will be better promoted by our sending the case back, for the consideration of another jury, than affirming the judgment.

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January 1831.

KEMPER  
vs.  
TURNER.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the case remanded for a new trial, the appellee paying costs in this court.

#### **BALSINEUR vs. BILLS**

#### **APPEAL FROM THE COURT OF PROBATES OF EAST BATON ROUGE.**

The Supreme court will not remand a cause when it appears that justice has been done.

*Martin J.* delivered the opinion of the court.

This case came up to the court from that of the third district, and was remanded in June term 1828, with directions for its transfer to the Court of Probates.

The judge of probates gave judgment for the defendant, being of opinion he had established his plea of payment to the plaintiff's ancestor, of the sum of \$2500, and establishing a claim for services rendered to the latter during his last illness.

The plaintiff made an unsuccessful attempt to obtain a new trial, on the ground that the judgment was contrary to law and evidence, and had not done justice.

The case has been submitted without any argument. It presents no question of law, and it appears to us the judgment is supported by the evidence.

The supreme court will not remand a cause when it appears that justice has been done

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BALSINEUR  
vs.  
BILLS.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

*PERRON ET AL. vs. GRASSIER.*

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,  
THE JUDGE THEREOF PRESIDING.

The plaintiff may interrogate the defendant as to the truth of the facts alleged in the petition; but the latter may except to an interrogatory which from a blank being left therein, or other circumstances, is rendered unintelligible.

The points upon which this case turned are fully stated in the opinion of the court, delivered by Martin J.

The plaintiffs are appellants from the judgment which dissolves an injunction they had obtained.

They sought an appeal to the consciences of the opposite party, by interrogatories which the court refused, on the ground that they were not relevant to the issue, nor did they grow out of the averments in the petition.

These interrogatories were the following:

1. Are not the facts stated in the petition for the injunction true, as therein set forth?
2. At least the part of it which alleges that you are the holder of certain obligations, signed by B. Ramirez?
3. If you answer affirmatively, produce them in court, and if you will not, describe them fully, as to who signed them, when signed—for what amount, to whom payable, and what was the consideration for them?

Do you know any thing touching — in favour of the plaintiff, and if you do, say it out. To them due you, both for the amount claimed in your petition, for an order of seizure and sale, and on said notes; and what was the consideration of said act, and also of said notes?

We are unable to discover how the judge *a quo* concluded these interrogatories were not relevant to the issue. The defendant had pleaded the genesal issue—the plaintiffs were

bound to establish the averments in their petition, and sought to do so by an appeal to the defendant's conscience. Eastern District,  
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The last interrogatory, from a blank left in it, and the loose manner in which it is worded, is not very intelligible. PERRON ET AL.  
vs.  
GRASSIER.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the injunction reinstated and the case remanded for further proceedings, with directions to the judge to receive the interrogatories, saving to the party interrogated, his right of excepting to the last interrogatory, on account of its inaccuracy and the loose manner in which it is worded. The appellee paying costs in this court.

**NEWSOM vs. ADAMS.**

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT,  
THE JUDGE OF THE FOURTH PRESIDING.

Parol evidence of the *lex non scripta* of a foreign country, must be received without the party offering it being required to show that there is no statute law on the subject.

This was an action for the recovery of a slave. On the trial of the cause, the plaintiff offered parol evidence of the law of Mississippi, in relation to the mode of transferring slaves. To the introduction of this testimony, the defendant objected, unless it was first shown, that there existed no statute law on the same subject.

The court overruled the objection, received the evidence, and the defendant took his bill of exceptions in these words: "Be it remembered, that on the trial of this cause, the counsel for plaintiff introduced parol proof, to show the law of Mississippi, in relation to the mode of transfer of slaves, without first showing that there existed no statute law on the subject. To evidence of this kind, the counsel for defendant objected, and tenders this bill for signature." There was judgment for the plaintiff, and the defendant appealed. The cause was submitted upon points without argument.

*Hennen*, for appellant, made the following :

U

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1. The bill of exceptions taken by defendant, should be sustained, and the cause sent back for a new trial.

*McCaleb* contra :

1. The bill of exceptions gives *no reasons* why the judge was wrong, except that the "laws" of Mississippi and the "Statute Law," are different things. An absurdity that requires no explanation.

*Martin J.* delivered the opinion of the court.

The counsel for the appellant shews that he offered, on the trial, parol evidence of the law of the State of Mississippi, in relation to the mode of transferring slaves, which the District Court refused to receive, unless proof was first made, that there existed no statute law on the subject, whereupon the counsel took his bill of exceptions.

The counsel of the appellee has contended, that the evidence was properly rejected, and "the bill gives no reason why the judge was wrong, except that the law of Mississippi and the statute law are different things." An absurdity which, the counsel says, requires no explanation.

Parol evidence of the *lex non scripta* of a foreign country, must be received without the party offering it being required to show that there is no statute law on the subject.

We think the judge erred. The law of every State includes its *lex scripta* and *lex non scripta*. Parol evidence must necessarily be admitted of the latter, but not of the former. The counsel ought, therefore, to have been permitted to offer parol evidence of the former. To require him first to administer evidence of the absolute silence of the statute law or *lex scripta*, was to insist on the production and reading of every statute of the State of Mississippi. He ought to have been permitted to proceed, and be stopped if he adduced parol evidence of the contents of a statute.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; the verdict set aside, and the case remanded, with directions to the judge not to prevent the admission of parol evidence of the law of the State of Mississippi, unless it be shewn, that there exists no statute law of that State on the same subject. The appellee paying costs in this court.

**CROFT vs. KIRKLAND'S SYNDIC.**

Eastern District,  
January 1881.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,  
THE JUDGE OF THE FOURTH PRESIDING.

**CROFT  
vs.  
KIRKLAND'S  
SYNDIC.**

A creditor who has appeared in the *concurso* and successfully attempted to obtain a different place on the tableau, is bound by the final judgment, and cannot maintain an action of nullity.

This was an action of nullity to set aside the proceedings in the case of Kirkland against his creditors, upon various grounds, which are given in the opinion of the court.

To the plaintiff's right of action, the defendant urged the following peremptory exception, to wit: That the plaintiff was put upon the Bilan in the insolvent proceedings complained of by him, and that he opposed the homologation of the tableau of distribution. This fact being established by the testimony, the court *a quo* sustained the exception, and dismissed the action, from which judgment the plaintiff appealed.

*Watts and Turner* for appellee.

*Ripley and Downs* for appellant.

*Porter J.* delivered the opinion of the court.

This is an action of nullity, to set aside and have declared void, the proceedings of a *concurso* in the case of Kirkland vs. his creditors. The following grounds are alleged in the petition.

1. There were no citations issued, or notices sent out by the notary, or published according to law, to convene the *concurso* for the surrender of property.

2. The cession of property was not made to the judge, and by him accepted for the benefit of the creditors, as provided for by law.

3. There were no citations, according to law, to the creditors who live out of the parish of East Feliciana.

4. It was not competent for the debtor, after the deliberations were closed, to make the cession of property, without new notices and citations, in order that all the creditors might be present at the choice of syndics.

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SYNDIC.

5. It appears from the process verbal of the deliberations, that Joseph A. Kirkland, the insolvent, did not make the cession until after many of the creditors went away, inasmuch as a greater number voted on the *concurso* for the respite, than were present, and voted for the cession of property.

6. The proceedings of the *concurso* were continued over to the 27th of February, 1827, without any vote of the creditors for that purpose, which is contrary to law.

7. Because all the proceedings in relation to said surrender were irregular, and without any law to justify them, and all sales and proceedings, in pursuance of the same, are illegal and void.

To this petition, various objections were presented in the shape of exceptions. We only deem it necessary to notice that which alleges that the plaintiff had made himself a party to the proceedings in *concurso*, and filed opposition to the tableau of distribution.

The evidence shews that the petitioner did object to the tableau of distribution, because he was placed thereon as a chirographary creditor, when he should have been put down as a privileged one. That his opposition was overruled in the court below, and that on appeal, this judgment was confirmed here.

A creditor who has appeared in the *concurso* and successfully attempted to obtain a different place in the tableau, is bound by the final judgment and cannot maintain an action of nullity.

We are of opinion that, after a creditor has appeared in *concurso*, and endeavoured to obtain the benefit of the proceedings had in the cause, that he cannot afterwards allege errors such as those set forth in his petition. It is similar to a party objecting to the mode in which suit has been commenced, and he brought into court after he has pleaded to the merit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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*MULLONY vs. McDOUGAL.*

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APPEAL FROM THE COURT OF THE PARISH AND CITY  
OF NEW-ORLEANS.

MULLONY  
vs.  
McDOUGAL.

The court cannot add interest to the verdict.

*Porter J.* delivered the opinion of the court.

This action is brought to recover from the defendant a sum of money, which, by the terms of the act of dissolution of partnership, that had existed between the parties, was to be paid over to the plaintiff. The merits of the cause present no questions but in relation to facts, and require no further observation from the court, than that they appear to us to be rightfully decided by the verdict of the jury.

But on that verdict which found a certain sum to be due, the court, in entering up judgment, added interest, and, in doing so, erred. The Code of Practice positively forbids it; and we have had occasion more than once, to acknowledge the application of the rule to cases in all respects similar to this.

The court cannot  
add interest to the  
verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be reversed, and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of nine hundred and seven dollars, 71 cents, with costs, in the court below. Those of appeal to be paid by the plaintiff.

*MOSSY vs. MEAD.*

APPEAL FROM THE COURT OF THE PARISH AND CITY  
OF NEW-ORLEANS.

The extension of a lease may be proved by parol, and the lessee is a competent witness for this purpose, if he be disinterested by a release.

If the lessee holds over without the opposition of the lessor after the expiration of the lease, there is a tacit reconduction, which binds him to pay the rent, and entitles him to hold the premises.

On the first day of January, 1827, the plaintiff leased a house to Hudson for one year, at one hundred dollars per month. The lease contained this clause: "It is likewise

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agreed that should Hudson require it, he will have the privilege of remaining in the said house for the space of seven years longer, being from the first day of January, 1828, to the first day of January, 1835, he paying the same rent, say one hundred dollars per month." On the first day of March, 1828, the following endorsement was made upon the lease: "I hereby assign my right, title and interest, to the within lease to Mr. J. K. Mead, from and after this date"—signed by Hudson and recorded in the office of a notary public. Under this assignment, the defendant took possession and paid the rent up to the first of July, 1829, at the rate of one hundred dollars per month. On the 3d of June, 1829, the plaintiff informed the defendant, that at the expiration of that month, the rent would be at the rate of one hundred and twenty-five dollars per month. The present suit was brought to recover five months' rent, from the 1st of July, 1829, at the rate of one hundred and twenty-five dollars per month.

The defendant admitted in his answer, that five months' rent was due, at the rate of one hundred dollars per month, and proved that he had made a tender to the plaintiff, which the latter refused to receive.

On the trial of the cause, the defendant offered Hudson as a witness, to prove that he had accepted the lease from the plaintiff, for seven years, from the 1st of January, 1828, and that he had been released by the defendant from all responsibility, as assignor of the lease. This testimony was objected to and rejected by the court, on the ground that no verbal testimony could be given as to the lease and assignment. The court below gave judgment for the plaintiff for the amount claimed, and the defendant appealed.

*Preston* for appellant contended:

1. Mossy leased the house to Hudson for one year, at \$100 per month, with the privilege of keeping it seven years at the same rate of rent. Hudson transferred the lease to



Mead, the defendant. He had a right to transfer and Mead to acquire the lease—C. C. art. 2696. It is therefore evident, Mead has a right to retain the house seven years, at one hundred dollars per month, which he has tendered to the plaintiff.

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2. No formal demand of the house by Hudson or Mead was necessary. Their assent to Mossy's proposition to lease it seven years, was sufficiently given by keeping it and paying the rent long after the first year had expired. If this was not an express, at least it was an implied assent—C. C. art. 1805. Mossy is presumed to have continued his proposition—Art. 1795, 1796, C. C. These principles of law are specially applicable to contracts of lease—C. C., Art. 2659.

*Derbigny, contra:*

1. By the lease, the plaintiff agrees that Hudson will have the *privilege of remaining* in the house seven years longer, provided *he* requires it, and *he* paying the same rent. Hudson was therefore bound to *require* of Mossy, the house for seven years—to *remain* in it seven years, and to pay the rent himself. These conditions could not be dispensed with, therefore no acceptance was made and no contract could be formed, because, says the law, the acceptance must be in all things conformable to the offer—C. C. art. 1799. But supposing Hudson had complied with all the conditions of the proposal, that circumstance would not render good the pretended transfer to the defendant, of the privilege granted to Hudson, because this privilege was essentially personal, and not transferrable, as the words very plainly indicate.

2. Mead was tenant at will of Mossy, and had received notice that the rent would be increased; therefore bound to pay the rent demanded—C. C. art. 2655, 2656.

*Martin, J.*, delivered the opinion of the court.

The plaintiff claims house rent for five months, due on the

Eastern District, first of January, 1830, at one hundred and twenty-five dollars per month.  
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The defendant admits five months are due, but denies that they are due at one hundred and twenty-five dollars per month, and avers, the rent is at one hundred dollars only, therefore he tenders five hundred dollars, which he avers he has been ever ready to pay. He claims, as assignee of Hudson, a lessee of the plaintiff, for the year 1827, with the faculty in the lessee, to keep the house till the year 1835.

There was judgment for the plaintiff, and the defendant appealed.

The record shews that the plaintiff introduced his own letter to the defendant, of the third of June, 1829, announcing that the rent of the house would, in future, be at the rate of fifteen hundred dollars a year; a copy of which was admitted to have been received by the defendant, soon after its date. Proof was also made of the demand of the rent, at one hundred and twenty-five dollars, and the defendant's refusal to pay accordingly.

The defendant offered in evidence, a lease from the plaintiff to Hudson, and the latter's assignment thereof to the defendant. The signature to the lease, and assignment, were admitted to be genuine, but the plaintiff's counsel opposed these documents being read, but they were filed.

He next produced sixteen receipts, each for one month's rent at one hundred dollars, and the plaintiff's signature thereto was admitted.

He next proved a tender of four hundred dollars in December, for four months rent, due on the first day of that month, and the plaintiff's refusal to accept them.

He further proved, that during the summer of 1828, the house remained empty, he being absent, but that Wadsworth, his agent, nevertheless, paid the rent monthly, at the rate of one hundred dollars a month, and the tender and refusal of five hundred dollars for the five months rent claimed, were also proved.

The lease of the plaintiff to Hudson is for the year 1827, for twelve hundred dollars, payable monthly. It contains a clause, that "if Hudson should require it, he will have the privilege to remain in the house for the space of seven years longer, he paying the same rent, viz., one hundred dollars per month." Hudson's assignment is at the foot of the lease, its date March 1, 1828. The whole was registered in a notary's office on the 10th of June, 1829.

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At the trial the defendant offered Hudson as a witness, to prove that he had accepted, from the plaintiff, the extension of the lease for seven years. Hudson had a release of all claims from the defendant. His admission was opposed, and he was rejected on the ground of incompetency, and that no verbal testimony could be given about the lease and assignment.

We think the parish judge erred in rejecting Hudson, who was offered as a witness to prove that he had required the extension of the lease for seven years. He was disinterested by the release, and a lease is proveable by parol,—Civ. Code, 2653—the extension of it must be so.

The extension of a lease may be proved by parol, and the lessee is a competent witness for this purpose, if he be disinterested by a release.

But we do not think the decision of the case requires it to be remanded for Hudson's testimony. We consider the clause providing for the prolongation of the lease, as a substantial part of the contract, the benefit of which might be invoked by the lessee's transfer, and we think it was erroneously considered below, as a "mere benevolent promise from the plaintiff toward Hudson personally, not transferrable to another."

But it appears to us, that although Hudson did not avail himself of the faculty of renewing the lease for seven years, he was still a lessee for the year 1828, having leased the premises for the year 1827, for the rent of twelve hundred dollars a year, though payable monthly. He remained in possession till some time in March 1828, and paid the rent up to the first of April; this bound him to pay \$1200, in

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If the lessee holds over without the opposition of the lessor after the expiration of the lease, there is a tacit reconduction which binds him to pay the rent and entitles him to hold the premises.

monthly instalments, during the whole year 1828. This the defendant, his transferee, complied with during the last nine months of that year; at the expiration of it, nothing was said by lessor or lessee. The latter held over for six months in the year 1829; this was a renewal of the lease, or tacit reconduction, on the same terms, that is, for twelve hundred dollars a year, payable monthly, till the end of 1829. Early in June of that year, the plaintiff gave notice to the defendant, the rent would in future be fifteen hundred dollars a year. To this proposition to double the length of time for which the defendant was bound to keep the house, not to the increase of the rent, the defendant never assented. His rights are, therefore, not at all affected by it. He came into the house as the successor of Hudson, who having hired the house for twelve months, from the first of January, 1827, and having staid in it several months after the expiration of his year, was bound to keep the premises for a second year; at the expiration of which, the defendant did not leave the house, but continued to hold it, and pay rent for one half of the third year, which he therefore became bound to complete, and gave him the rights of a tenant till the expiration of the third year.

He has tendered and deposited the rent, to the last day of payment preceeding the inception of the suit.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided, and reversed, and that there be judgment for the defendant, with costs in both courts, saving to the plaintiff his right to the money tendered and deposited.

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CRAWFORD ET AL. vs. JEWELL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,  
THE JUDGE THEREOF PRESIDING.

Where the record shows that the testimony was taken down by the clerk.

no objection can be made to the certificate of the judge, that the record contains all the evidence adduced. Eastern District.  
January 1831.

When nothing to the contrary appears, the judge is presumed to have given his certificate on the event occurring which authorized him to give it.

If [the record show that documents were *produced*, when nothing shows they were *filed*, there is no evidence of a diminution of the record.

CRAWFORD & AL.  
vs.  
JEWELL.

This was an action for work and labour, in which the plaintiff had a verdict, and the defendant appealed.

On the trial of the cause, certain receipts were *produced* which did not come up with the record. The clerk certified that the evidence was taken down in writing in open court, and that the record contained a true and faithful transcript of all the proceedings, as well as of the documents *filed* in the suit. This was followed by the certificate of the judge that the record contained all the evidence adduced on the trial.

*Turner*, for appellees, contended :

1. The merits cannot be gone into, as the appeal is not properly certified. *C. P. art. 586, 896—2 Martin N. S. 303.*

2. The record does not contain all the evidence; three receipts are mentioned as produced, and they do not appear.

3. The clerk has not certified to any evidence, but that which was taken from the mouth of the witnesses, and they do not prove the amount, but only the signature to the receipts.

4. It is a case where the judge cannot certify—he can only certify in those cases where the record contains *all*; but where the record itself shows that it has not *all*, then the certificate cannot avail.

*Morgan and Ogden contra :*

1. The appeal is properly certified. The testimony was taken in writing in open court, as appears from the certificate of the clerk, therefore no statement of facts was necessary and the judge could certify as he has done—*C. P. art. 585, 586.*

2. The judge, it may fairly be presumed, was not called

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upon to certify, without an attempt, first having been made, to obtain an agreed statement of facts, and that he did not certify until convinced that his duty and the law required it.

3. The case cited by plaintiffs from 8th Martin, N. S. does not apply; because there the evidence had not been taken in writing in open court. The decision is grounded upon arts. 602 and 603 of the Code of Practice, and those articles provide for the case, "where the depositions of witnesses have not been taken in writing in the inferior court."

4. The verdict of the jury is entirely unsupported by the evidence, and the motion for a new trial ought to have prevailed. *Weathersby vs. Latham*; 7 Martin, N. S. 310, *Belden et al vs. Rose*; 8 Martin, N. S. 167.

*Porter J.* delivered the opinion of the court.

This action is brought for work and labour done by the plaintiffs for the defendant. The sum claimed is \$ 1,100.

The defendant pleads, that the work was not finished within the time specified in the contract: that it was unskillfully executed: that she was compelled to employ other workmen to complete the building: that she has paid \$585 on account: that by the plaintiffs neglect she could not commence making sugar at the proper season, and lost part of her crop. She alleges her damages to amount to \$2057 50 cents, and reconvenes the plaintiffs for the sum.

The cause was submitted to a jury, who found against the defendant for \$291 12 cents. She made an unsuccessful attempt to obtain a new trial, and appealed.

There are one or two bills of exceptions on record, which we have considered as abandoned, no notice having been taken of them in the points filed, or observations addressed to the court.

The appellees insist that the merits cannot be inquired into in this court, as the record has not been properly certified.

It is certified by the judge to contain all the evidence ad-

Where the record shows that the testimony was taken down by the clerk, no objection can be made to the certificate of the judge that the record contains all

duced on the trial of the cause. And the record shews that the testimony was taken down in open court by the clerk during the trial. This we think a sufficient compliance with the provisions of our law on this subject. *Code of Practice*, 601, 603.

When nothing to the contrary appears, the judge is presumed to have given his certificate on the event occurring which authorised him to give it.

But it is said, the judge can only give a certificate when the transcript contains *all* the evidence, and that, from an examination of the record, it will be perceived that part of the proof given on the trial does not come up.

If this were true, it might afford grounds for correcting the error, and supplying the deficiency, but none for holding the judge incapable of certifying. His certificate is one of the means given by law to enable this court to know whether *all* the evidence is sent up, and an error in the exercise of a power, offers no argument against that power being conferred. The receipts, which it is urged are wanting to make the record complete, are stated to have been produced on the trial. This is true, but although the statement says they were *produced*, nothing shews they were *filed*, consequently we have no evidence before us there is a diminution of the record.

On the merits, we are constrained to state, that the proof adduced by the parties, has brought us to a conclusion so entirely different from that of the jury and the court below, that we must remand this cause for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled; that the case be remanded to be proceeded in according to law, and that the appellees pay the costs of this appeal.

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the evidence ad-  
duced.

When nothing to the contrary appears the judge is presumed to have given his certificate on the event occurring which authorised him to give it.

If the record show that documents were produced when nothing shows they were filed, there is no evidence of a diminution of the record.

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*THOMAS ET AL. vs. THOMAS*

*THOMAS ET AL.*  
*vs.*  
*THOMAS.*

APPEAL FROM THE COURT OF THE THIRD DISTRICT,  
THE JUDGE OF THE FOURTH PRESIDING.

It is not sufficient ground to reject a witness that another has or may contradict him.

The existence, loss, and contents of a will may be proved by parol testimony.

This suit was brought to recover from the defendant, a slave, to which the latter set up title, under the will of his brother Joseph Thomas.

On the trial of the cause, the defendant offered witnesses to prove, that they had seen and witnessed an instrument of writing, purporting to be the last will and testament of Joseph Thomas, deceased, and that they were sworn by the judge of probates, to prove the signature of the deceased, when the will was offered for probate. The defendant's counsel stated, that this evidence was offered for the purpose of establishing the fact, that such a will was once in existence, and that their object was subsequently to prove the loss of the will, so as to enable them to give parol evidence of its contents. To the introduction of this testimony, the plaintiffs counsel objected, on the ground that the defendant must first prove the loss of the will.

The court refused to allow the evidence, on the ground that a will being an instrument of writing, clothed with certain formalities prescribed by law, must appear to have been complied with, which could only be done by inspection of the will itself.

There was judgment for the plaintiffs, and the defendant appealed.

*Lawrence and Ogden* for appellees.

*Gurley and Morgan* for appellant.

*Porter J.* delivered the opinion of the court.

The petitioners claim from the defendant a slave. In his answer, he sets up title to the property under the last will and



testament of one Joseph Thomas, deceased, and avers that the will was presented and proven, after his decease, before the judge of probates, in and for the parish of East Baton Rouge, and ordered to be executed: that, since the inception of this suit, he has applied to the Probate Court for the will, but has been unable to procure it: that if the original can be found, or a certified copy, it will be offered in evidence; and in case it should not, the next best evidence in the defendant's possession will be given.

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On the trial of the cause, the defendant, in support of the allegations contained in his answer, offered, *first*, a petition to the judge of probates, in which it was stated, that by the will of Joseph Thomas, a negro had been bequeathed to the petitioner, but that the testamentary disposition had been reduced to one third of the property left, by virtue of an order of the court. The petition concludes with a prayer, that the property should be sold. On this application, which appears to have been filed on the 16th of April, 1825, the judge made the following order: "Let a public sale of the property, real and personal, belonging to the succession of Joseph Thomas, take place on the 16th of May, on the following terms," &c.

He also offered a petition to the Court of Probates, dated the 25th March of the year 1825, setting forth, that a will had been left by Joseph Thomas, and praying that it might be admitted to probate, and its execution ordered. On this petition, the following order was given: "Let ten days' notice be given of the prayer of this petition."

The defendant then offered witnesses to prove, that they had subscribed the will: that they had been sworn before the judge of probates to prove it. He then offered to prove the loss of it, and after such facts being proven, he would offer evidence of its contents." To this testimony, the plaintiff objected on several grounds—the most important of which appear to be: 1st, That parol testimony of the execution of the will could not be given in that court: that

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It is not sufficient ground to reject a witness that another has contradicted him.


a will being an instrument clothed with certain formalities prescribed by law, in order to give it effect, no evidence of its loss, or its contents, could be offered, until its existence, with the requisite formalities, had been proved : 2dly. That the judge of probates had been examined and had deposed, "that he had never seen such a will, and that no such will had been ever recorded in his office."

The last objection may be dismissed at once. It is of the first impression, certainly, to object to the competency of one witness, because another has or will contradict him. That may go to his credit, but furnishes no ground to refuse hearing him. The first objection is entitled to more consideration; but we still believe it unsound. The law of evidence, would have a poor claim to the praise justly bestowed on it, if it did not foresee and provide for such a case as this. That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides this objection; for it is only another form of expression for the idea, that when you lose the higher proof you may offer the next best in your power. *The case admits of no better evidence than that which you possess, if the superior proof has been lost without your fault.* The rule does not mean that men's rights are to be sacrificed and their property lost, because they cannot guard against events beyond their control. It only means, that so long as the higher or superior evidence is within your possession, or may be reached by you, you shall give no inferior proof in relation to it. Particular rules which require written proof, always relax themselves to meet absolute necessity, or that necessity which is occasioned by occurrences common among men.

The existence, loss, and contents of a will, may be proved by parol testimony.

There is nothing in a will being required to be in a particular form, which makes it an exception to this great law of necessity. It may increase the difficulty of the proof, but furnishes no reason to refuse hearing it. The court in this case, had proof before them which much diminished the danger of

parol evidence. Extracts from the records of the Court of Eastern District, Probates, shewed that the judge had ordered the will to be executed, because he had ordered that property bequeathed by it, should be sold.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and it is further ordered, adjudged and decreed, that the cause be remanded to the District Court, with directions to the judge not to reject parol proof of the execution of the will of Joseph Thomas, and of its loss. And it is further ordered, that the appellees pay the costs of this appeal.

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*WALL vs. WILSON.*

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

Although a party be arrested and held to bail, service of the petition and citation cannot be dispensed with.

Knowledge of the suit, on the part of the defendant, no matter how clearly it may be brought home to him, will not suffice, if this formality has not been pursued.

By the 4th section of an act passed on the 25th March, 1828, it is provided, "That in all cases where attachments, arrests and sequestrations, are demandable, the plaintiff, his agent or attorney, having made affidavit, and given bond in conformity to law, and having filed the same in court, it shall be the duty of the clerk to issue, forthwith, the process required, without any petition being then presented; but that the usual petition shall be filed on the succeeding day, and the sheriff shall proceed immediately to execute the same, according to its tenor."

Upon affidavit filed in this case, an order issued, and on the 27th of April, 1830, the defendant was arrested for a debt due the plaintiff, and released from custody, on the same day, upon giving bond conditioned not to depart from the State, without leave of the court. He did depart without such leave, so that the copy of petition and citation could

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not be served upon him, on the subsequent day. On the 5th of May, service was made on the defendant's bail.

The plaintiff discontinued his prayer for a jury, and proceeded to take a judgment by default, which was afterwards made final, and from which the defendant appealed.

*Conrad* for appellant, assigned for error apparent on the face of the record :

1. That the defendant was never cited.
2. That the plaintiff had no right to try the case by the court, after a jury had been allowed.

*McCaleb* for appellee, contended :

1. The arrest was due citation and notice to the defendant that he was sued. He cannot take advantage of his own wrong, violate the condition of his bond, and now appear and plead want of citation.

2. The citation served upon the bail was good. By construction of law, defendant was in the custody of his bail. Service upon his keeper was service upon him, when he chose to fly from the officer and elude justice. He had no place of residence where service could have been otherwise made.

3. There was no issue joined, plaintiff had only prayed a jury, with a view to get his cause tried before the adjournment of the court in the summer, it then being occupied with the jury docket alone. The prayer for a jury was only a *privilege*, which he could waive by striking out that part of his petition.

*Porter, J.* delivered the opinion of the court.

The plaintiff made oath to the existence of the debt for which suit is brought, and further stated, that the defendant was about to remove from the State, without leaving in it sufficient property to satisfy the petitioner's demand. On filing the petition with this affidavit annexed, an order of arrest issued, and the defendant was taken into custody.

He gave bond with security, that he would not depart from the State without leave of the court; or that he would pay the judgment which might be rendered against him.

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It appears, however, that without this leave, he did depart, and as the citation which subsequently issued against him, could not be served, copies of it, and the petition, were left with the bail.

The plaintiff proceeded to take judgment by default, and had it made final. The defendant has appealed, and contends in this court that the whole proceedings were illegal, as he never was cited.

By the 4th section of an act passed on the 25th of March, 1828, it is provided, that in all cases where attachments, arrests, and sequestrations are demandable, the plaintiff, his agent or attorney, having made affidavit, the process required shall issue, without any petition being *then* presented.—*Acts. 1828, p. 150, sec. 4.*

This regulation was intended to obviate an inconvenience which sometimes arose from transient debtors, getting out of reach of process, before a petition could be drafted, and copies of it and citation procured; and its object was not only to secure their persons to respond to the final judgment, but also to enable the creditor to make service of the petition and citation. The experience of this case shews, that the legislature have failed in their object when the debtor can find bail. For, though arrested, he has, by giving bond, effectually prevented service of either petition or citation on him. The question then is, whether these can be dispensed with; or whether the arrest can stand in place of them, so as to authorize judgment by default. We think not. The law, as it is well known, and it is unnecessary to cite its provisions, requires citation as the basis of all proceedings, and declares the judgment void, which is not preceded by it. Knowledge of the suit on the part of the defendant, no matter how clearly it may be brought home

Although a party be arrested and held to bail, service of the petition and citation cannot be dispensed with.

Knowledge of the suit on the part of the defendant, no matter how clearly it may

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be brought home  
to him, will not  
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to him, will not suffice if this formality has not been pursued. Nothing will cure the defect but appearance, and pleading to matters other than the defect of the citation. Now though it is certainly not very agreeable to see the ingenuity of a debtor, baffle and set at nought a provision of law, made more effectually to coerce his appearance, yet we cannot help it. The conduct of the defendant, in truth, amounts to nothing more, than that he knew a suit was about to be commenced against him, and evaded the process. This we are afraid many others do, and such conduct does not authorize judgment against them. The knowledge gained by arrest, cannot be distinguished from that acquired through any other source, as to its effect on the debtor. It is not citation, but a means of having citation made. It is clear the law, notwithstanding the arrest, contemplated the service of petition and citation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the suit be dismissed with costs in both courts.

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*BOATNER vs. VENTRISS' HEIRS.*

APPEAL FROM THE COURT OF THE THIRD DISTRICT, THE  
JUDGE THEREOF PRESIDING.

Evidence must be received of the value of the fruits from the period when the possessor is ascertained to be in bad faith.

When the Supreme Court remands a cause on a single point, it remands it also for an enquiry into all the questions which grow out of the discussion of that point.

The owner who procures the eviction, has a right to elect whether he will pay the value of the materials, and the price of the workmanship, or a sum equal to the enhanced value of the soil.

On appeal, the plaintiff's title to the land in controversy was established, and the cause remanded, in order to ascertain the value of the improvements made by the defendant,

while in good faith. The court below, decided that the defendants held possession in good faith, up to the 29th of September, 1823, and permitted them to prove the value of the improvements up to that period. The plaintiff then offered testimony, to establish the value of the fruits gathered by the defendants, from the period when it was decided they were in good faith. To the introduction of this testimony, the defendants objected, on the ground that the cause had been remanded for trial, upon a single point, to wit. : to ascertain the value of the improvements put upon the ground. The court sustained the objection, and gave judgment in favour of the defendants, for the value of the improvements. From this judgment the plaintiff appealed.

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*Turner* for appellant. *Morgan* for appellees.

*Porter J.* delivered the opinion of the court.

This case has been already before us. The question which it presented in respect to title was decided, and the cause remanded for an enquiry into the value of the improvements, during the time the defendants were in good faith.

The court below was of opinion that they were so, up to the 29th of September, 1823, at which time the commissioners at St. Helena court-house decided in favour of the plaintiff's title; and in that opinion we concur. Proof was accordingly given of the value of the improvements up to that date.

Evidence must  
be received of the  
value of the fruits  
from the period  
when the possessor  
is ascertained  
to be in bad faith.

But on the plaintiff's attempting to establish the value of the fruits, gathered and reaped by the defendants, from the time the good faith ceased, the court, on the objection of the defendants, refused them permission to do so, on the ground that the cause had been remanded for an enquiry into the value of the improvements alone.

The court, in its judgment, said nothing of the fruits, because it was only on the contingency of the defendants being in bad faith (which was yet undecided,) that an enquiry

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When the Supreme Court remands a cause on a single point, it remands it also for an enquiry into all the questions which grow out of the decision of that point.

The owner who procures the eviction has a right to elect whether he will pay the value of the materials and the price of the workmanship, or a sum equal to the enhanced value of the soil.

could be gone into in relation to them. The moment that fact was ascertained, the District Court should have received evidence as to their value. They were claimed in the petition, and had not been passed on. When the Supreme Court remands a cause on a single point, it remands it also for an enquiry into all the questions which grow out of the decision of that point.

Two bills of exceptions on record, present substantially the question, whether the possessor who has *bona fide* erected works, &c. on the land of another, has a right to claim the value of the materials and the price of the workmanship, or the sum equal to the enhanced value of the soil. This question is settled by the provisions of our code, which, in express terms, give the choice to the owner who procures the eviction. Consequently the court erred in refusing permission to the plaintiff, to shew whether the property had been enhanced in value at the time final judgment was to be rendered and possession restored.—*La. Code, art. 500.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that this cause be remanded to the District Court, with directions to the judge not to refuse permission to the plaintiff to prove the value of the fruits from the 29th of September, 1823, nor to shew, whether the property is enhanced in value by the labour of the defendants; and it is further ordered that the appellee pay the costs of this appeal.

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LA MOUREAU ET AL vs. FOWLER.

APPEAL FROM THE COURT OF THE PARISH AND CITY  
OF NEW-ORLEANS.

Where a price is agreed upon for an article which is neither weighed or delivered, and two days thereafter it be destroyed, it is not such a delay as to make the agent liable to the owner. Nor is it incumbent upon the former to sue the buyer when the owner declines giving him authority for that purpose.



The plaintiffs claimed the value of thirty-eight bales of cotton, which they had placed in the hands of the defendant, a commission merchant, for sale. The answer admitted the receipt and sale of eight bales—nett proceeds one hundred and ninety three dollars and thirty seven cents—but denied being responsible for the remainder, as it had been, without any fault of the respondent, consumed by fire.

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There was also a plea, in reconvention, for supplies furnished the plaintiffs, to the amount of three hundred and five dollars and forty-six cents, for the balance of which, after deducting the proceeds of the eight bales, the respondent prayed a judgment in his favor.

The cotton was received in the spring of 1829, and stored in a brick building, covered with slate. It was sold to the Messrs. Bowers, at a price agreed upon, on the 9th January, 1830, but neither weighed or delivered; and consumed by fire on the twelfth of the same month. It was not sold sooner, because the price was limited above the market value.

After the destruction of the cotton, the defendant called upon the plaintiffs for authority and evidence, to institute suit against the buyers, which they declined giving. There was judgment for the plaintiffs in the court below, and the defendant appealed.

*McColeb*, for appellant, contended

1. The defendant cannot be made liable for the thirty bales of cotton which were burnt up. He had stored in a good warehouse. The cotton was not sold sooner because plaintiffs had limited it to a price which could not be had; it therefore, remained at their risk, as they had not ordered insurance. It was a fortuitous event by which the loss occurred.

2. The letter of defendant to plaintiffs, stating that he would sue the buyers, who had agreed for the cotton prior to the fire, did not bind him to sue. It was further stated by one of the plaintiffs, that he must counsel with his partner

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before he could give leave to sue. Besides suit would have done no good, for a *sale* had not taken place; the cotton not having been weighed.—C. C. 2431, 2446, 2433.

3. The account plead in compensation and reconvention was fully established. There was a balance of one hundred and eleven dollars and seventy-two cents due defendant, for which judgment is prayed, and the reversal of that of the court below.

*Cannon* for appellee.

*Martin, J.* delivered the opinion of the court.'

The plaintiff alleges he sent thirty-eight bales of cotton to the defendant to sell for his, the plaintiff's account, which he refuses and neglects to account for.

The answer accounts for eight of the bales, and avers that the other 30 were sold on the 9th of January, and destroyed by fire on the night of the 12th, before the defendant could have them weighed and delivered, without any fault or neglect on his part.

The defendant claimed a balance for supplies furnished the plaintiff beyond the proceeds of the sale of the eight bales.

There was judgment against the defendant for the value of the thirty-eight bales, and he appealed.

The record shews the thirty bales were sold on Saturday, the ninth of January 1830, and were neither weighed or delivered on that day, nor on the following Monday or Tuesday the 11th and 12th; on the night of the latter day, the cotton was consumed by fire, without any other fault or neglect of the defendant, but the alleged fault, not delivering the cotton.

The defendant informed the plaintiff he concurred he might recover from his vendors, on account of their neglect and delay to take possession of the cotton: and requested to be furnished with evidence of the weight of the cotton for that purpose. One of the plaintiffs coming to the city, the de-

fendant repeated the request to him, and asked leave to use the plaintiffs' name on bringing suit against the buyers. But this was refused the plaintiff in the city, refusing to consult his partner.

Eastern District.  
January 1831.

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On these facts, the judge *a quo*, has concluded the defendant was not chargeable, on account of the delay, in delivering the cotton, during the two days between the sale and the destruction of the cotton; but that he was, for the neglect to sue his buyers.

We are of opinion a delay of two days was not necessarily evidence of such neglect on the part of the defendant, as ought to make him answerable for the subsequent misfortune, and the judge did not err in concluding he ought not to be charged on that account.

But we think that the defendant, having applied for evidence, to support a suit against the buyers, and the plaintiffs having neglected to furnish it, and having declined to allow the use of their names in such a suit, cannot complain it was not brought, especially as they might have brought, and still may bring it. The judge, therefore, in our opinion, erred in charging the defendant with the value of the cotton on this account.

Where a price is agreed upon for an article which is neither weighed or delivered, and two days thereafter it be destroyed, it is not such a delay as to make the agent liable to the owner. Nor is it incumbent upon the former to sue the buyer, when the owner declines giving him authority for that purpose.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and proceeding to give such a judgment as, in our opinion, ought to have been given below. It is ordered, adjudged and decreed, that the defendants claim, in re-convention, for three hundred and five dollars, forty-six cents (305 46) be allowed, that he be charged with two hundred and nine dollars thirty-four cents (209 34,) with proceeds of the eight bales, and that there be judgment for the balance, ninety-six dollars twelve cents (96 12), with costs in both courts.

## CASES IN THE SUPREME COURT

Eastern District  
January 1891.

*RABASSA*  
vs.  
*PASSEMENT ET*  
*AL.*

*RABASSA vs. PASSEMENT ET AL.*

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where the contractor for a building is sued for materials furnished, and the owner made party to the suit, the latter is only responsible for the costs incurred after issue joined.

This suit was brought to recover the value of materials furnished by the plaintiff to Passement, and employed by him in the construction of a building he had undertaken for Norwood. The plaintiff prayed for judgment against Passement, and that Norwood be condemned to satisfy the same out of the amount due by her to Passement for the erection of the building. Norwood plead the general issue, and Passement admitted the correctness of the plaintiff's claim. There was judgment for the plaintiff as prayed for, and Norwood condemned to the payment of costs. The latter appealed.

*Preston and Seghers* for appellees.

*Carleton and Locket* for appellant.

*Porter, J.*, delivered the opinion of the court.

The plaintiff furnished materials to the defendant, Passement, which were used by him in the construction of a house for Norwood. The petition states that Passement owes the value of them, which he refuses to pay, and that Norwood is indebted to Passement to the amount of plaintiff's demand and more. It concludes by a prayer that the debt due to Passement may be seized—that judgment be rendered against him, and that Norwood, as his debtor, be compelled to pay it.

Passement acknowledged the debt in his answer, and Norwood denied that she owed Passement any thing.

On the latter issue a good deal of evidence was taken, and the judge *a quo*, gave judgment against Passement for the amount claimed, and directed it should be satisfied out of the funds in the hands of Norwood.

From this judgment, the defendant, Norwood, after an

unsuccessful attempt to obtain a new trial, has appealed. Eastern District,  
January 1881.

The question was one of fact, and we think was correctly decided in the court of the first instance. But the appellant complains that she was compelled by the judgment to pay all the costs of the suit, and that is well founded. The costs incurred after issue joined, she is justly responsible for, because her pleading untruey occasioned them. But we are unable to see on what ground she is rendered liable for the costs of bringing Passement, her creditor, into court. We can discover no other, except that it was her neglect to comply with her engagement to the undertaker, which obliged the furnisher of the materials to bring suit against him, and this we do not think a good reason. It would not, in the case of an ordinary debt, be legal to make a debtor responsible for the costs incurred in a suit against his immediate creditor, although his failure to comply with his engagement may have been the cause the creditor was sued. We cannot distinguish between the cases, and we are not aware of any law which extends the responsibility of a contractor for a house, in relation to costs, beyond that of a debtor for any other thing.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding to give such judgment here, as in our opinion ought to have been rendered below, it is ordered and decreed, that the plaintiff do recover of the defendant, Passement, the sum of four hundred and one dollars fifty cents, with interest, from judicial demand and costs incurred by the proceedings, up to the time of his filing an answer in the cause. And it is further ordered, that the said judgment be satisfied out of the funds in the hands of Elizabeth Norwood, due to said Passement, and that, in case she fail to pay the same, within ten days from the notification of the decree, that execution do issue against her therefor; and it is further ordered, that she pay all the costs of this suit from

*WABASSA*  
vs.  
*PASSEMENT ET*  
*AL.*

When the contractor for a building is sued for materials furnished, and the owner made party to the suit, the latter is only responsible for the costs incurred after issue joined.

Eastern District, the time of filing her answer, except those of appeal, which  
January 1831. are to be paid by the appellee.

BARASSA

vs.

PASSEMENT ET

AL.

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McMICKEN vs. MILLAUDON.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,  
THE JUDGE THEREOF PRESIDING.

No matter can be urged to delay the execution of a judgment which might have been presented on a trial of the cause.

The judgment cannot include interest if none be given by the verdict, but such an error furnishes no grounds for an injunction; nor is it a cause of nullity.

The plaintiff obtained an injunction against the execution of a judgment which the defendant had recovered against him, and prayed that it might be declared null, for the following grounds: 1. That on the trial of the cause, the defendant denied, on oath, certain facts, which the plaintiff was now able to establish by the books of the defendant, and other competent evidence. 2. That the judgment did not pursue the verdict, in this, that it gave interest, when no interest was given by the verdict. 3. That the defendant still held certain notes, which the plaintiff had transferred to him as collateral security, although he had obtained judgment for that amount. 4. That the mortgage given by plaintiff, to secure the payment of the debt, was uncanceled and still held by the defendant.

The court below dismissed the suit and dissolved the injunction, on the defendant's plea of *res judicata*. The plaintiff appealed.

*Ripley and Downs*, for appellant, contended :

That the plea of *res judicata* could not be taken in an action of nullity, and cited C. P. art. 204; Moreau and Carlton's *Partidas*, 283, 4 Law 19; *Beauchamp vs. McMicken*, 7 Mar. Rep. n. s. ; 1. *Pothier* 536 N. 6, 544 to 547 No. 17 to 27: 10 *Toulier* 223, No. 157; 229, No. 162.

*Pierce*, contra,

By the plaintiff's own shewing, there is no cause for an injunction.

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January 1881.

M'NICKEN  
vs.  
MILLAUDON.

*Porter, J.*, delivered the opinion of the court.

This suit was brought to obtain an injunction against the execution of a judgment which the defendant had recovered against the plaintiff.

The petitioner lays these grounds for it :

*First*, That he transferred notes and account, previous to the judgment to the defendant's attorney, which he had not received credit for: *Second*, That the verdict of the jury was for a certain sum, and that the court gave interest on it, which is erroneous: *Third*, That the defendant still holds the notes he received as collateral security; and that the notes should have been transferred to the petitioner before judgment was rendered, and should yet be transferred before it is enforced: *Fourth*, That the defendant still holds the original mortgage for the debt on which the judgment was rendered, and that it is still uncanceled, though he has been requested to do so.

The petition states, that the plaintiff was condemned on the former trial, because he had not his evidence ready, but that on a new investigation, he will be able to show, that the judgment rendered against him was erroneous, and that part of this evidence, he believes, will be obtained from the books of the defendant.

The court below on hearing, dissolved the injunction upon the matters appearing on the petition. It acted correctly in doing so. The only thing which appears strange to us is, that it should be granted on such allegations. All the matters now urged to delay the execution, either were, or ought to have been, presented as a defence when the plaintiff contested the defendant's action, and it is now too late to claim the benefit of them. From this remark, however, must be excepted, the complaint that the judgment was erroneous in

No matter can be urged to delay the execution of a judgment which might have been presented on a trial of the cause.

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M'ICKEN  
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The judgment cannot include interest if none be given by the verdict, but such an error furnishes no grounds for an injunction, nor is it a cause of nullity.

giving interest where the verdict did not find any. But such an error, if there was such a one, furnishes no ground to enjoin the judgment. There must be an end to litigation at some time, and in some place. And if on errors, real or alleged, causes were to be tried again, after judgment unappealed from, or after those rendered in the last resort, they would never terminate. This is no cause of nullity—it is not pretended it was through the corruption of the judges, or the fraud of the defendant, that interest was given from judicial demand, when it ought not to have been given.

We have rarely seen a case where the right to apply for an injunction, and that of appealing to the court, have been more misapplied from the purposes for which they were given, than this case presents; and parties must be taught, by all the means within the power of this court, that remedies given for their protection, are not to be used as a means of inflicting injury on others.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.—And it is further ordered and decreed, that plaintiff in injunction, pay to the defendant, the sum of ten per cent. on the amount of the original judgment, viz: on two thousand and forty-three dollars, as a penalty for the frivolous appeal in this case.

WATTS vs. McMICKEN ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT.  
THE JUDGE OF THE FOURTH PRESIDING.

Complaints as to the conduct of a Curator, can only be redressed when as Curator he presents his account. Particular acts of the representatives of estates cannot be singled out by individual creditors, and made the basis of a suit.

This was an action by the creditors of an estate charging the curator with fraud and collusion; and praying that certain doings, which had operated to their injury, might be de-



clared null and void. The defendant put in a plea to the jurisdiction of the court, which being sustained, the plaintiff appealed.

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January 1881.

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vs.  
MILLAUDON.

*Pierce*, for appellant, contended:

1. That the petition showed an action against the defendant for fraudulent conduct in the administration of an estate, by which the plaintiffs were enjoined.

2. The court had jurisdiction.

*Downs*, contra ;

1. A probate sale is a judicial proceeding, including always, a judgment of that court, and can be annulled only by that court.—*State v. Favrot*, 1st La. Rep. 49.

2. A sale of a vacant estate is *ordered* by the judge of the Court of Probates, on application, by petition, for that purpose.

3. The court which renders a judgment, alone has jurisdiction of the action of nullity to set it aside.—C. P. art. 608, 609, 610.

4. The proper time and place to object to a probate sale is in the court of probates, before the homologation of the proceedings.—*Lafon's Ex. v. Phillips et al.*, 2d Martin, N. S. 225, 234; 12th Martin 329.

*Porter, J.*, delivered the opinion of the court.

The plaintiff *Watts*, in conjunction with another creditor of the estate of *Reno*, complain of the defendant, curator of the succession, of having entered into an agreement with the other creditors, to take notes and obligations from a debtor of the estate ; and with having violated that agreement, by causing execution to issue against the debtor, and selling certain property, of which he became the purchaser through the agency of *Achison*, the co-defendant. The petitioners state, that they have suffered great injury by these acts of the curator, and they pray that the sale made under execution of the debtor, may be set aside ; that the de-

Eastern District.  
January 1831.

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vs.

MILLAUDON.

defendant, McMicken, be compelled to comply with his agreement, and take his share of the notes which were offered to the creditors, and finally that they have such other relief as their case might require.

A plea to the jurisdiction of the court was presented and sustained. The plaintiff appealed.

Complaints as to the conduct of a curator can only be redressed when as curator he presents his account. Particular acts of the representatives of estates can not be singled out by individual creditors, and made the basis of a suit.

It appears to us the court did not err. The act complained of is in relation to the defendant's conduct as curator, viz. : in improvidently issuing a writ of execution from the court, under which he held his appointment, in favor of the estate he represents. The time to get redress for this, will be when as curator he presents his account. Particular acts of the representatives of estates cannot be singled out by individual creditors, and made the basis of a suit. There can be only one to render an account, and when that is presented, all the acts of the curator, whether of nonfeasance or malfeasance, by which the creditors are injured, can be opposed to him. This doctrine has been long established in this court. The reasons for it are obvious. There might be as many suits as there are creditors, if a contrary rule was admitted. Again, the act complained of cannot be known to be an injury until the settlement of the estate, for *non constat*, that notwithstanding the alleged impropriety on the part of the representative, there may not be enough to pay each creditor his claim.—See the case of *Hodge's heirs vs. Dunnford*, 1. N. S. 126, and the authorities then cited.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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BAUDIN vs. POLLOCK'S CURATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH  
OF WEST FELICIANA.

A judgment rendered by a Spanish tribunal before the session, bears interest from the judicial demand.

*Martin J.* delivered the opinion of the court.

The plaintiff and appellant complains of the judgment of the Court of Probates, which refuses him interest on his demand.

The suit was brought on a judgment rendered by a Spanish tribunal of competent authority, rendered before the cession, and the appellant's counsel has urged that interest ought to have been allowed from the date of the judgment against the deceased.

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January 1881.

DAUDIN

vs.

POLLOCK'S GU-  
RATOR

A judgment rendered by a Spanish tribunal before the cession, bears interest from the judicial demand.

We are of opinion that the Court of Probates erred in not allowing interest from the inception of the suit or original judicial demand in that court, as the claim was liquidated by the Spanish tribunal; but we know no law which authorizes a claim of interest before that period.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, and that there be judgment for the plaintiff; that he do recover of the defendant the sum of eighteen thousand five hundred and ninety-two dollars ninety-eight cents, from the estate of Pollock, with interest at the rate of five per cent from the day of the inception of the suit, that he be decreed a privileged creditor of said estate, on the proceeds of the piece of land situated at the mouth of bayou Tunica, and the costs be paid by the estate.

**RUSSELL & BARSTOW vs. CASH ET AL.**

APPEAL FROM THE COURT OF THE THIRD DISTRICT, THE  
JUDGE THEREOF PRESIDING.

A person who signs a draft as executor, is liable in his private capacity, and if he be sued as executor and there be a prayer for general relief, judgment may be given against him individually, if it appear that his liability as such was sought to be established.

This suit was brought to recover the amount of a protested draft, which the defendant, Cash, as executor of Kirkland, had made and delivered to the plaintiffs. The petition concluded with a prayer for judgment against the defendant

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*vs.*

*CASH ET AL.*

in his capacity of executor—that it might be satisfied out of the funds of the estate, and for general relief.

The plaintiff afterwards filed an amended petition, in which he set forth, that the defendant, Cash, executor aforesaid, had due and legal notice of the protest and non-payment of the draft, by which he became liable—and further, that the heir of Kirkland had taken possession of the estate, who he prayed might also be made a party defendant, and cited to shew cause, why judgment should not be rendered on said draft against the executor, and the same judgment rendered against the heir in possession, as a privilege upon the property of the succession. The general issue was pleaded by the heir, and, Cash excepted on the ground that at the time of filing the petition he was no longer executor, more than a year and day having expired since letters testamentary were granted, without any application for a renewal. The judge charged the jury, first: that the presumption of law was, that the executorship ceased at the end of the year and day, and made it incumbent on the party suing an executor, to shew that the letters had been renewed; 2dly. that the allegations in the petition would not support an action against the executor, in his individual capacity; he must be charged with having improperly and falsely described himself as executor, after his functions had ceased. To this charge the plaintiff excepted. There was judgment for the defendants and the plaintiff appealed.

*Pierce*, for appellant, contended:

1. That if Cash was not liable as executor, he was in his individual capacity.

*Turner*, for appellees.

*Porter, J.*, delivered the opinion of the court.

The petitioners sue on a draft made by the defendant, Cash, in favour of the petitioners. It is drawn at thirty days' sight, on the house of Hagan & Co., and signed "C

Cash, executor of Moses Kirkland, deceased." The cause was submitted to a jury, who found for the defendants. The plaintiffs have appealed.

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On the trial the judge charged the jury. "The presumption of law is that the executorship ceased at the end of the year and day, and made it incumbent on the party suing an executor, in order to fix the succession he represents to shew that his letters had been renewed. That the allegations of the petition would not support an action against the executor in his individual capacity, he must be charged with having improperly and falsely described himself as executor, after his functions had ceased." The plaintiffs filed a bill of exceptions to these opinions:

The first branch of the charge under the final view we have taken of the case, need not be noticed ; on the second, we remark, that the executor having no authority to bind the estate by drafts, or bills of exchange, or notes, the suit against him as representative of the estate, cannot be maintained, and *a fortiori*, the heir is not bound by such a contract, and it cannot be the basis of judgment against her. The defendant is, however, responsible on the draft given, in his private capacity. The words, "executor of Moses Kirkland," added to his signature, can be considered in no other light but as words of description, which neither add to, nor diminish the individual and personal responsibility of the party using them. The only question is, whether the court, under the pleadings, could give judgment against the defendant. The plaintiffs have been cautious to state, that the defendant, Cash, made the note as executor—that as executor he is responsible—that as executor he may be cited—and that the judgment be satisfied out of the estate, of which he is executor. It concludes, however, with a prayer for general relief.

Wherever the evidence in a cause shews that the petitioner is entitled to recover, the uniform practice of this court

A person who  
signs a draft as ex-  
ecutor, is liable in

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his private capacity, and if he be sued as executor, and there be a prayer for general relief, judgment may be given against him individually, if it appear that his liability as such, was sought to be established.

has been to give judgment for him, although he may have mistaken the ground on which he alleged the liability of the defendant. This is in furtherance of justice, to prevent delay, and to save costs. There is, however, a necessary limitation to such a principle, namely, that the proceedings in the inferior court should have apprised the party, that relief was sought from him on other grounds than those alleged; otherwise he might be deprived of a defence to the action in the capacity in which it is endeavoured to make him liable. Thus if there was nothing else in the record before us, but the evidence, we should doubt if this was a case for the application of the rule, because that evidence was called for by the pleadings, which charged him as executor, and did not apprise him that he was sought to be made responsible individually. But we see from the proceedings below, that the plaintiff did attempt to establish the liability of the defendant on the trial in his private capacity. The evidence sustains him in that attempt, and we, therefore, think that he should recover. The prayer for general relief authorizes judgment against him individually.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered that, as to the defendants Rucker, there be judgment in their favour with costs in the court of the first instance. And that the plaintiff do recover of the defendant, Cash, the sum of four hundred and ninety-eight dollars 86 cents, with interest at six per cent, from the 23d of February, 1828, the date of protest, with costs in the court below, and with those of appeal.

**WARFIELD vs. HIS CREDITORS—FRANKLIN, APP'T  
APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

The decree of the Supreme Court remanding a suit against a firm, one of whom is insolvent, virtually cumulates the suit with the other proceedings *in concursu*.

The payment of partnership debts by a solvent partner, ought not to delay the payment to the syndic, of moneys which he was otherwise entitled to receive.

On the insolvency of a partner, his syndic has a concurrent, but no exclusive right to the liquidation of the affairs.

The facts of this cause are fully stated in the opinion of the court, delivered by

*Porter, J.*

Previous to the filing of the *bilan* of the insolvent, the appellant had commenced an action against him, and obtained a sequestration of property in his possession. In that suit, one McCall intervened, and claimed a specific part of the effects seized. On appeal, his claim was disallowed, the amount of the appellant's demand on the insolvent liquidated, and the cause remanded, in order that the funds of the estate should be distributed according to law.

On the judgment of the Supreme Court being filed in the court below, the counsel for the syndic took a rule on the appellant, to show cause, "why the moneys in the hands of the sheriff, arising from the sale of the goods and effects sequestered in the case of *Franklin vs. Warfield*, should not be paid over to said syndic, to be distributed according to law."

To this rule, the appellant presented an exception, viz ; that no disposition of the funds in the hands of the sheriff, could be made in any other suit but that in which the writ of sequestration issued. The court overruled the exception, and the appellant filed an answer, in which he in substance stated:

That he was a solvent partner in the late firm of Franklin and Warfield, and as such, had as much right to the possession of the funds of the firm or partnership, as the syndic had; but that the sheriff, being in possession, as sequestrator, by order of court, in the suit of the respondent vs. Warfield, and Morgan, syndic, &c., that neither party was entitled to a possession of the whole, or any part thereof, until a final

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liquidation and partition of the funds of said firm should be made.

That the judgment of the Supreme Court, rejecting the claim of McCall, and sending back the cause, to have such a distribution of the funds as the law required, placed the parties in the same position, and left them with the same rights, as to the possession of the property, as they were before the rendition of the judgment in the District Court.

And finally—that since the institution of his suit against the insolvent, the respondent had further paid debts against the firm, to the amount of \$2,257 89, for which he prayed judgment against the insolvent ; and, further, that he had a right to have the amount already decreed to him by the Supreme Court, as well as that for which he had since become a creditor, paid to him out of the funds sequestered : and that if the funds were not sufficient to pay the whole, that judgment should be rendered in his favor, against the private property of the insolvent.

On filing this answer, the respondent offered to go to trial on it, if the counsel for the syndic would admit the facts therein stated. But the counsel of the syndic refused to do so, and the court, notwithstanding the objection of the respondent, proceeded to a consideration of the case, and after hearing counsel, made the rule absolute. *From this decision the present appeal is taken.*

The decree of the supreme court remanding a suit against a firm, one of whom is solvent virtually cumulates the suit with the other proceedings in concursio.

In this court the appellant has contended :

*First*, that the judge below erred in overruling his exception. *Second*, that he erred in not granting a continuance, and placing the cause on the trial docket. *And, third*, that he erred on the merits, because the appellant, as solvent partner of the firm, had as much right to the administration and possession of the partnership property, as the representative of the insolvent partner had.

1. And as to the first point, we do not think the judge er-



red. As the suit against Warfield necessarily abated by the insolvency, and could only be carried on against the representative of the estate, it followed, that in order to make the proceedings regular, it should be cumulated with the other matters in concursio. Whether an order of court, formally directing it, had been obtained at the time the rule was taken, does not appear; but it was virtually transferred by the decree of the Supreme Court remanding the cause, with directions to distribute the funds according to law. They could only be distributed contradictorily with the other creditors. The representative of the insolvent partner, under any hypothesis, having a right to the possession of one half of the property.

2. On the second point, no means have been furnished to us which enable us to say the court erred. The bill of exceptions speaks of facts which the appellant wished the syndic to admit. We can find no facts set out in the answer in relation to the funds sequestered, to which evidence could have applied; and to obtain which, a continuance could have been granted. We have already stated the defence in substance, as we understand it; and it appears to us to be nothing more than an assertion of the legal rights of the parties, as they resulted from the facts already before the court. The additional claim, set up in the answer in consequence of debts paid by the respondent, since the rendition of the judgment in the Supreme Court, ought not to have delayed the paying over the money into the hands of the syndic, if he was the person properly entitled to it during the pendency of the suit.

3. The last question in the cause is the only one of importance: it is, whether on the insolvency of one of the members of a partnership, his syndic has a right to the administration and settlement of its affairs? and we think it very clear, that though he has a concurrent, he cannot have the exclusive management. The bankruptcy dissolves the part-

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The payment of partnership debts by a solvent partner, ought not to delay the payment to the syndic, of moneys which he was otherwise entitled to receive.

On the insolvency of a partner his syndic has a concurrent, but no exclusive right to the liquidation of the affairs.

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nership, and it would seem to follow, that its liquidation must proceed in the same manner as if it had terminated by death, or by mutual consent. The representative of the partner, now no longer able to act for himself, has the same rights as the person he represents would have had ; and if the latter could not demand and obtain the settlement of the partnership concerns, the former cannot. Now it is clear, that the insolvent Warfield, could not, without a special agreement to that effect, have a right to exclude his co-partner from the possession of the partnership property, and the liquidation of its affairs, in case the firm had dissolved by mutual consent of parties, and his bankruptcy cannot increase the right. The syndic, and the solvent partner, we think are entitled to the joint administration, until the debts are paid, or until the joint funds are all applied to that purpose. It would, perhaps, be more convenient, if the legislature had provided in cases of this kind, for a single administrator, but it has not done so, and until it does, the legal rights of the partners, as they grow out of a common contract of partnership, confer on each an equal power to assist in the liquidation and settlement of the estate.

In this case, from the evidence it appears, that partnership property was sequestered, of which the appellant had as much the control as the syndic. The order of the inferior court, therefore, delivering the whole amount to one of the parties, was erroneous.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered, that the rule taken in this case be discharged—the appellee paying the costs of appeal.

**GRIFFON vs. JACOBS ET AL.**

APPEAL FROM THE COURT OF THE PARISH AND CITY OF  
NEW-ORLEANS.

The holder of a negotiable note by blank endorsement, may maintain suit on it without filling up the same to himself.

*Porter, J.*, delivered the opinion of the court.

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GRIFFON

vs.

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This is an action against the maker and endorser of a promissory note. The general issue was first pleaded by both defendants, and the maker of the note afterwards added to his defence a special plea, that the consideration of the instrument sued on, was the return by the petitioner of a negro slave which he had failed to deliver.

The cause was submitted to a jury in the court below who found for the plaintiff. The defendants moved for a new trial, which was overruled, and the endorser has appealed.

The record has been submitted to the court for its judgment, without argument. In looking into the transcript we can discover no ground whatever for the appeal, except that the note has on it the endorsement of the plaintiff, and there is no evidence to shew how he became possessed of it. This circumstance, however, has been decided in this court, not to prevent a recovery when the endorsement, as in this case, is in blank.—7 N. S. 254.

The holder of a negotiable note by blank endorsement may maintain suit on it without filling up the same to himself.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with cost.

#### **BOUQUETTE'S GUARDIAN vs. DONNET.**

APPEAL FROM THE COURT OF PROBATES FOR THE  
PARISH AND CITY OF NEW-ORLEANS.

A suit against an executor for property sold by him contrary to law, is not a suit against the estate, but against him in his own right, and, therefore, cannot be bought in the Court of Probates.

The defendant, testamentary executor of his deceased wife, having sold a slave which his testatrix had bequeathed to Rouquette, was sued by the plaintiffs (heirs of the legatee) to recover the proceeds of the sale. The defendant pleaded that the legatee, previous to her death, had released and abandoned to him, all right and title to the slave

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bequeathed to her by the testatrix. The court below gave judgment for the plaintiffs, and the defendant appealed.

*Morphy*, for appellant, made the following point.

1. The Court of Probates has no jurisdiction in an action for damages, against an executor, for any illegal act of his administration after his functions have expired.—*Martin's Rep. N. S. vol. 3, p. 601, C. C. art. 1179.*

*Dennis*, for appellee.

*Porter, J.*, delivered the opinion of the court.

The petition states, that by the last will and testament of one Cousin, deceased, a certain slave was bequeathed to the mother of the minors, whom the plaintiff, in this action represents. That she is since dead, and that they are her representatives, with their brothers and sisters, and that the defendant, who was executor of said will, has sold the slave for the sum of fifteen hundred dollars.

It further alleges, that the defendant has refused to pay to the petitioner, the sum due to the minors, for whom he is guardian, and it prays for judgment against him for the sum of six hundred and four dollars, the minors' share in the legacy left to their mother, with interest since the day of sale, and costs.

The answer denies that the defendant is indebted to the plaintiff in manner and form as alleged; and it further avers, that the mother of the minors, for whose benefit this action is instituted, did in her life time, remit and release to the defendant, all right and title in and to the slave bequeathed to her by the testatrix.

The court below gave judgment for the petitioners, and the defendant appealed.

In this court an objection has been made to the jurisdiction of the Court of Probates. It is contended the action should have been instituted before the tribunals of ordinary jurisdiction.

The plaintiffs insist, this is a demand for a specific legacy, or for the proceeds which represent it, and that the Court of Probates could take cognizance of the case.

The petition charges, "that Louis Donnet, (the defendant) appointed in the said last will and testament, testamentary executor of his deceased wife, was qualified as such, *but instead of executing faithfully* the said last will, he sold the said slave for fifteen hundred dollars."

It concludes by a prayer, "that the said Louis Donnet, testamentary executor as aforesaid, be cited to answer said petition, and condemned to pay the petitioners the sum of six hundred and four dollars, with interest and costs."

It appears to us, this is a demand against the executor, in his personal capacity, for the value of property sold by him contrary to law. In other words, for a tort or wrong done by him. The words *testamentary executor*, used in the petition, can only be understood as words of description, and if they were intended otherwise, they would not give the probate tribunal jurisdiction. The judgment prayed for could not be executed against the succession. The act of the executor has converted the property on which that court could act, into a personal demand against him for doing so. The estate cannot be responsible in interest and costs for the faults of the representative.

We think the Probate Court had no jurisdiction of the case, and that the petition must be dismissed, with costs in both courts.

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A suit against an executor for property sold by him contrary to law, is not a suit against the estate, but against him in his own right, and therefore cannot be brought in the Court of Probates.

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TEETZMAN vs. CLAMAGERAN.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Every thing which is voluntarily sacrificed for the benefit of all concerned, is considered the subject of general, not particular average.

Masts hanging over the side of a vessel fall under the head of general average; but they only do so, for the value they had at the time they were cut away.

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THEETZMAN  
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A freighter of goods is not bound to contribute his proportion of the price which the new masts cost, he is only responsible for his proportion of the value the masts had after they were broken by the storm, and at the time they were cut away.

The brig *Mississippi*, on a voyage from Bordeaux to New-Orleans, encountered a gale of wind which broke both her masts, and while along side, attached by the rigging, they were cut away to save the ship, which afterwards put into Bilboa to refit. On her arrival in New-Orleans, a general average was made up, and this suit brought by the owner to compel the defendant, who had shipped on board a quantity of goods, to contribute his proportion of the loss amounting to \$483 18. There was judgment for the plaintiff in the court below and the defendant appealed.

*Cannon*, for appellant, cited art. 1940 C. C.—*Evans et al. vs. Gray et al.* 12th Martin's Rep. p. 475.—*Saul vs. his creditors*, 5th Martin, N. S. p. 569.—Code de Commerce, art. 399, 403, 410, 397.—*Le Nouveaux Valin*, pages 606, 607, 617, 619, 620, 626.—*Partidas*, titre 9, loi. 4, p. 754.

*Carleton and Lockett*, for appellee.

*Porter, J.* delivered the opinion of the court.

This action is brought to compel the defendant to contribute his share of a loss sustained by a vessel, of which the plaintiff was owner. The defendant was a shipper of goods on board the brig, at the time she received the injury. She was compelled to enter an intermediate port, in consequence of the damage sustained, and was there repaired.

The evidence shews that the brig, on her voyage from Bordeaux to New-Orleans, encountered a violent gale of wind, which broke her masts. After they were broken they hung for sometime overboard, and while in that situation, the captain cut the rigging which attached them to the vessel, and freed her.

There is some slight contradiction in the authorities, whether under these circumstances, masts and rigging, form a

subject of general average. The better, and more general opinion seems to be, that they do. Every thing which is voluntarily sacrificed for the benefit of all concerned, being considered the subject of general, not particular average.

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The next enquiry in this case is, what was sacrificed?

not sound masts certainly. For before they were cut away for the general safety, or even before a determination was taken to cut them away, they had been broken by the tempest. In the situation they were, at the time the rigging was cut, and they were got clear of, they would have been the subject of particular average. Any injury they sustained, previous to the time they were sacrificed for the general benefit, cannot be the subject of contribution, for that injury was not voluntarily incurred for the benefit of all. Compensation should be made to the amount of the loss sustained, and that amount was their value at the time they were separated from the vessel. One of the English writers (Stevens,) assigns for reason, why masts hanging over the sides of a vessel are not a subject for general average, that the situation in which they are placed, renders them of no value. *Phillips* says they are, or may be of some value, and that to the extent of that value they are a matter for contribution. *Bouley Paty*, in recognising the rule, that they properly fall under the head of *avarie grosse*, states, but they only do so, for the value they had at the time they were cut away. This appears to us the good sense of the matter, for it is quite unjust to make the freighters contribute for the full value of masts, which were already rendered scarcely of any, by an accident, or force, for which they were not responsible.—*Bouley Paty*, tit 12, sec. 2, vo. 4, 446. *Stevens on average*, p. 1, ch. 1, 31, a 5. *Emergon*, vol. 1. ch. 12, sec. 41, p. 622. *Phillips*, on *Ins.* 333.

Every thing which is voluntarily sacrificed for the benefit of all concerned, is considered the subject of general not particular average.

Masts hanging over the side of a vessel fall under the head of general average, but they only do so, for the value they had at the time they were cut away.

The average has been settled in this case on the ground that the defendant was bound to contribute his proportion of the price which the new masts cost in the port where the

A freighter of goods is not bound to contribute his proportion of the price which the

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new masts cost, he is only responsible for his proportion of the value the masts had after they were broken by the storm and at the time they were cast away.

repairs were made. This we think an error for which the judgment must be reversed. The defendant is responsible for his proportion of the value the masts had after they were broken by the storm, and at the time they were cut away.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled; and it is further ordered, that this cause be remanded to the District Court with directions to be proceeded in according to law. The appellees paying the costs of this appeal.

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SILVA & CO vs. LAFAYE.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where a continuance is prayed for, owing to the want of a return to the commission which issued seventeen months before, the affidavit should state the causes which led to the failure and the probable grounds of there-after obtaining the testimony sought.

A policy of insurance is good evidence to show the fact of the vessel having been insured but furnishes no proof as to her value.

The plaintiffs effected insurance upon their vessel chartered to the defendant for a voyage from New-Orleans to St. Jago Veraguas, and from thence back to the port *aquo*. The petition charged, that the voyage was deviated from and the vessel lost, by which breach of contract, the plaintiffs had lost their recourse upon the Insurance Company, and the defendant had become liable to pay the value of the vessel. The claim was resisted by the defendant, on the ground, that the vessel was represented as sea worthy, when, in fact, she was not so. That she encountered tempestuous weather and leaked badly, which forced the captain to put into Grand Cayman Island, where a survey was held and the vessel condemned.

The deviation from the voyage agreed upon—the loss of the vessel, and the fact of her being well found and seaworthy at the commencement of the voyage, was fully establish-



ed by the testimony. There was a verdict and judgment for the plaintiff, and the defendant appealed.

*Cannon* for appellant.

*Preston* for appellee.

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vs.  
LAFAYE.

*Porter, J.*, delivered the opinion of the court.

This is an action on the contract of charter party. The plaintiffs allege the defendant did not use the vessel for the voyage agreed on, and for which, with his knowledge, she was insured. That by the deviation, and delay attendant on it, the schooner was lost, and the plaintiffs deprived of all recourse on the Insurance Company.

The defendant pleaded the general issue; and further, that the deviation alluded to in the petition, was produced by the vessel being decayed and ill found, and that her subsequent loss, was owing to the same cause.

The case was submitted to a jury in the court below, who found a verdict in favor of the plaintiffs, for fourteen hundred dollars, with interest. The defendant appealed.

A continuance was prayed for in the court below, on the affidavit of the defendant's agent—that from the non return to the commissions forwarded by him to the Grand Cayman and Porto Bello, he could not go safely to trial: that he expected to prove by them the decayed state of the vessel, and that the affidavit was made to obtain justice and not with a view to improper delay.

The petition was filed on the 10th November, 1828, and the answer on the 12th December of the same year, a few days after the commissions spoken of in the affidavit, were taken out, and the cause was called for trial on the 30th of May, 1830.

It appears to us that after a delay of seventeen months, the court did not err in refusing the continuance. The causes which led to the failure of obtaining a return to the commission, and the probable grounds of getting hereafter

Where a continuance is prayed for, owing to the want of a return to a commission which issued sev-

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enteen months before, the affidavit should state the causes which led to the failure, and the probable grounds of there-after obtaining the testimony sought

A policy of insurance is good evidence to show the fact of the vessel having been insured, but furnishes no proof as to her value.

the testimony sought for should have been presented in the affidavit, for the court, not the party, is to judge of the diligence used.

The plaintiffs introduced the policy of insurance in evidence, and the defendant objected to it, because it did not sufficiently appear, the same vessel was insured for which this suit is brought, and because the value therein given to the schooner could not be evidence against him.

The plaintiffs disclaimed all intention of offering the document for the purpose last mentioned, but insisted it was good evidence to shew the fact of the schooner being insured; of this opinion was the judge below, and such is the opinion of this court. The description given in both instruments, viz.: the charter party, and the policy, convinces us that the same vessel was the object of contract in both.

On the merits, we see no ground to differ from the conclusion of the court and jury below. To shew that they erred, reliance has been principally placed on a discrepancy between the copy of the charter party produced by the plaintiffs, and that read in evidence by the defendants. The contradiction exhibited by these instruments, places the court under the necessity of deciding, whether there has been an interlineation in the one, or an omission in the other. As the former could not have taken place without fraud, and as the latter may have been by error, we prefer giving credit to the instrument introduced by the plaintiffs, more especially, as the other evidence in the cause corroborates the truth of it.

It is, therefore, ordered, adjudged and decreed. that the judgment of the District Court be affirmed with costs.

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BAUDUC'S SYNDIC vs NICHOLSON ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A marshal of the United States District Court, in his official capacity, is

not, perhaps, amenable to a state court, and as such, cannot be controlled by it ; but if in that capacity he wrongs a citizen of the state, he is individually answerable, and in her courts.

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BAUDOU'S SYN-  
DIC CO.  
NICHOLSON & AL

If the petition charges the defendant with having acted under a pretended admiralty process, a plea to the jurisdiction of the court takes the fact for granted, that the process was a pretended one, and the plea is no answer to the petition.

After the cession of the insolvent's property had been accepted by the Court of the First District, on the 30th of July, 1830 ; and all proceedings against his person and property stayed, a steam-boat which had been surrendered, was seized by Nicholson, Marshall of the United States District Court, at the suit of Victor David, a citizen of the State of Louisiana, and who had been placed on the bilan of the insolvent. The petition stated that this seizure was made under color of a pretended admiralty process, issued on the 6th of August, 1830. That, in contempt of the authority of the State Court, and while the boat was in custody of the law, the marshall had violently taken possession and refused to deliver her up.

The petition concluded with a prayer, that the boat be sequestered, and that Nicholson & David be condemned in *solidum* to the payment of \$11000 damages, being the value of the boat—and for general relief.—Both defendants excepted to the petition. Nicholson pleaded, that in the exercise of his official duties, under the direction of the Court of the United States, he was not amenable to the jurisdiction of this court—and David declined the jurisdiction of the court, because a court of the State of Louisiana had not the power to enquire into the regularity of the proceedings of a court of the United States, in any matter which might be pending before said court, or to restrain or control this respondent in the exercise of his discretion in appealing to the tribunals of the United States, for such remedies as they may afford him in the prosecution of his rights. The court *a quo* sustained the exceptions, on the

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ground that David, having caused a legal judgment to be executed, and Nicholson having acted under a special order from a competent court, could not be deemed trespassers. From this judgment, the plaintiff appealed.

*Seghers*, for appellant, made the following points:

1. When an insolvent debtor files his schedule and petition, praying for a surrender, it is the duty of the judge to accept the cession of all the insolvent's property, for the benefit of his creditors.—2 *Moreau's Dig.* 436.

2. From and after such cession and acceptance, all the property of such insolvent debtor, mentioned in the schedule, is justly vested in his creditors, and is not liable to be seized, attached, taken, or levied on.—2 *Moreau's Dig.* 437.

3. From that moment, the said property is in the custody of the law, under the authority of the State and its courts wherein the suit is pending—and, therefore, any subsequent seizure of the said property is a trespass, for which the trespassers are liable in damages to the creditors.

*Slidell*, for appellees.

*Porter, J.* delivered the opinion of the court.

The petition states, that on the 30th of July, 1830, Theodore Bauduc filed his petition for a surrender of his property to his creditors: and that, on the same day, the surrender was accepted for their benefit, by the judge.

That among the property so surrendered was the steam-boat Florida, and that among the creditors was one Victor David, a citizen of this State, residing in New-Orleans.

That the decree of the District Court, accepting the surrender, staying the proceedings, and calling a meeting, was published the day following in the newspapers the *Courier de la Louisiane* and *l'Abeille*.

That notwithstanding these premises, and in contempt of the authority of the court, while the said steam-boat was in the custody of the law, Nicholson, Marshal of the United

States Court, for the eastern district, under colour of a pretended admiralty process, issued on the 6th instant, from said court, at the suit of Victor David, did seize and take into possession the steam-boat Florida, and though often requested, refuses and declines to deliver her up to the petitioners.

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It concludes by averring that, in consequence of those illegal proceedings, the creditors of the estate have suffered damages to the amount of eleven thousand dollars.

To this petition, exceptions were separately filed by the defendants.

Nicholson pleaded, "That in the exercise of his official duties, under the directions of the Court of the United States, he is not amenable to the jurisdiction of this court;" and David declined the jurisdiction, "Because a court of the State of Louisiana has not the power to enquire into the regularity of the proceedings of a court of the United States, in any matter which may be pending before said court, or to restrain and controul the respondent in the exercise of his discretion in appealing to the tribunals of the United States, for such remedies as they may afford him in the prosecution of his rights."

Several delicate and interesting questions have been argued, which the pleadings just recited do not present.

The exceptions do not meet the case set out in the petition. The plaintiffs claim damages for an act done, which they allege to be illegal, and Nicholson answers that in the exercise of his official duties, he is not amenable to the State Court. He is not perhaps amenable to the State Court, in his official capacity, as marshal, and, as such, cannot be controuled by it; but if in that capacity, he wrongs a citizen of the State, he is individually answerable, and in her courts. The petition does not state the cause is pending in the United States Court.

A marshal of the United States District Court, in his official capacity, is not, perhaps, amenable to a state court, and as such, cannot be controuled by it; but if in that capacity he wrongs a citizen of the state, he is individually answerable, and in her courts.

The plea of the other defendant, David, we consider

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If the petition charges the defendant with having acted under a pretended admiralty process, a plea to the jurisdiction of the court takes the fact for granted, that the process was a pretended one, and the plea is no answer to the petition.

equally defective. He declines the jurisdiction of the district judge, because the court of the State of Louisiana has not the power to enquire into the regularity of the proceedings of a court of the United States, in any matter which may be pending before said court. And he further states, that the State Court cannot control the respondent in the exercise of his discretion, in appealing to the tribunals of the United States for such remedies as they may afford him in the prosecution of his rights.

The petition does not allege any cause to be pending in the United States Court, or that any cause had been commenced there. It charges the defendant with having acted under a pretended admiralty process; and an exception takes the fact as true. The plea is, therefore, no answer to the petition. The question raised by the latter part of the exception, as it does not grow out of, nor refer to, allegations made by the plaintiffs, can be viewed in no other light but an abstract proposition, to which we can give no answer.

It was observed at the bar, that there was an apparent contradiction in the petition charging that a *pretended* admiralty process had *issued* from the court. This may be true, but still it is difficult to perceive how, under any idea which can be gathered from such an allegation, the State Courts are debarred from an enquiry into the complaint of one of our citizens, who avers injury by the proceeding. If the process issued improperly, where the suit was not one in *rem*, an enquiry may be made, whether it was legal or not. If it was not one in *rem*, and the defendants pretended it was, there is less ground for presenting it as a bar to all investigation—and if the whole was fictitious, and pretended, there is no reason whatever, for giving it such an effect. Certain we are, that such an averment is far from embracing all these matters, on which jurisdiction can be denied to the State Courts. The pleadings, on either side, are not sufficiently clear and explicit, to enable us to pronounce

satisfactorily on a cause involving questions of such magnitude. In remanding the case, we are desirous it should be understood, that we have not formed any opinion on the points discussed; we merely think that the exceptions on record, taken in reference to the petition, offer no bar to the plaintiff's demand.

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And it is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed: that the exceptions filed in this cause be overruled, and the cause remanded for further proceedings—the appellee paying the costs of this appeal.

#### KIRKLAND vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,  
THE JUDGE OF THE EIGHTH PRESIDING.

A creditor of an insolvent who files his opposition to the homologation of the tableau, cannot afterwards urge any irregularities against the proceedings which might have been embraced in his first opposition.

The facts of this cause are fully stated in the opinion of the court, delivered by

*Martin, J.*

Croft, an opposing creditor, is appellant of a judgment overruling his motion to have the application of the syndics, the appellees for the homologation of the tableau of distribution rejected, and to have all anterior proceedings annulled, and avoided, on the following grounds :

1. There is no order of the judge for a meeting of the creditors to accept the cession, nor any permission prayed for, or obtained by the insolvent, to make the cession.
2. The proceedings before the notary, on the application for a respite, were never returned into court and homologated, so as to authorise any further proceedings.
3. The cession was never accepted by the judge.
4. The insolvent stated no loss of property which rendered a cession necessary.

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5. The oath, as to the correctness of the schedule, is not in due form, and is substantially insufficient. The active and the passive debts are not stated, and it is not averred that the property has not been diverted to the injury of the creditors.

6. The party had, the year before, made a similar application, and there is no proof of any new loss.

7. The schedule shows property to the amount of more than twenty thousand dollars, and the debts do not amount to twelve thousand dollars.

It appears that the applicant had, at a former term, filed his opposition to the homologation of the tableau, and had failed, and the District Court was of opinion, he could not now be allowed to make a new one, nor to urge the irregularity of the proceedings anterior to his former opposition.

In this court the appellant's counsel has further shown, as errors apparent on the face of the record :

1. That there was neither citation issued, nor notice sent out by the notary, nor advertisements published, for a meeting on the surrender.

2. The cession was not made to, or accepted by the judge for the benefit of the creditors.

3. Creditors residing out of the parish were not cited,

4. After the close of the proceedings on the respite, the cession could not be made without a new call of the creditors.

5. The cession was made after most of the creditors had departed.

6. The proceedings before the creditors were continued from day to day, without any vote of the creditors.

A creditor or an insolvent who files opposition to the homologation of the tableau, cannot afterwards urge any irregularities against the proceedings which

The counsel for the syndics and appellees have contended, that a creditor, who was a party to the proceedings of an insolvent against his creditors, and who filed an application, cannot maintain an action of nullity for any matter which might have been embraced in his first opposition.--*Babin et al vs. Laine et al.* 4 n. s. 611; *Lafon's ex. vs. Desesart*, 1 n. s. 71 ;



*Mayfield vs. Comeau*, 7 N. S. 180; *Saul vs. his creditors*, Eastern District, *id.* 433; *White et al. vs. Lobre*, *id.* 566. February 1831.

We do not think the District Court erred. The appellant came into court with an opposition which was overruled, and the judgment against him was affirmed in this court.—7 N. S. 138 and 516. The matter passed in *rem judicatem*. His appearance cured all anterior irregularities on the score of citation.

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might have been  
embraced in his  
first opposition.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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CALVERT vs. TUNSTALL.

APPEAL FROM THE COURT OF THE PARISH AND CITY  
OF NEW-ORLEANS.

After a general denial, an amended answer, setting up a want of consideration to the note sued on, cannot be received.

The defendant sued upon his promissory note, pleaded the general issue, and afterwards moved to file an amended answer, setting up a want of consideration. The court *a quo* overruled the motion, there was judgment for the plaintiff, and the defendant appealed.

*Hawes*, for appellant.

The judge erred in refusing an amendment to the defendant's answer.

*Hoffman*, contra—prayed a confirmation of the judgment with damages for a frivolous appeal.

*Porter, J.* delivered the opinion of the court.

The defendant was sued on a promissory note, and pleaded the general issue. He afterwards moved for leave to amend his answer, by withdrawing the denial and pleading want of consideration. The court refused him leave to do so, and judgment being given against him, he appealed.

By the Code of Practice, the defendant may amend on the same condition on which this privilege is given to the

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GALVERT

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After a general denial, an amended answer setting up a want of consideration to the note sued on, cannot be received.

plaintiff, namely, that the substance of the demand in the one instance, and the defence in the other is not altered.

We think it was substantially changing the defence, to turn the matter at issue from a question as to the execution of the note, into one in relation to the consideration on which it was given, and that the court did not err in refusing to receive the amendment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

BARBARIN vs. ARMSTRONG

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.

If the appellant fail to file the record, and it be brought up by the clerk of the lower court and the appellee cited, he may pray for affirmation of the judgment.

Judgment was rendered against the defendant as endorser of a promissory note, from which he appealed. The record was brought up by the clerk of the lower court and the appellee cited, who prayed affirmation of the judgment, with damages, for a frivolous appeal. This was opposed on the ground, that the record should have been filed by the appellant, or brought up by the appellee.

Conrad, for appellant.

Nixon, for appellee.

Martin, J., delivered the opinion of the court.

The plaintiff and appellee has prayed the affirmation of the judgment with damages.

The appellant's counsel has replied, that the judgment cannot be affirmed, as the record of the suit is not regularly before us, as it was not filed by the appellant, nor brought up by the appellee.

It appears, the record was brought up by the clerk of the

Parish Court; but the appellant's counsel desired the clerk of this court not to receive it, nor to enter it on the docket.

The appellee was duly cited, and his counsel, finding a copy of the record in the Clerk's Office, might well avail himself of it, and move for the affirmation of the judgment. —*Code of Practice* 530. We do not see any utility in his procuring a second copy. *Lex neminem cogit ad vana.*

The opposition made before us by the appellant's counsel, has rendered it useless for us to inquire, whether his client was entitled to any notice of the appellee's intention to move for the affirmation of the judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs and ten per cent. damages for the frivolous appeal.

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BARRABIN
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ARMSTRONG.

If the appellant fail to file the record, and it be brought up by the clerk of the lower court, and the appellee cited, he may pray for affirmation of the judgment.

TRAHAN vs. McMANNUS ET AL.

APPEAL FROM THE COURT OF THIRD DISTRICT, THE JUDGE OF THE SECOND PRESIDING.

Amendments are not matters of course, and cannot be made without leave of the court, or consent of the party—if they be, they cannot be noticed.

If it appear from the pleadings or evidence, that both parties claim under the same title, neither will be permitted to attack it.

A creditor at whose suit the property is sold, cannot treat the conveyance as a nullity. If the alienation be in fraud of his rights, he ought to bring an action to set it aside.

A donation, under the form of an onerous contract, is not void.

An affidavit for a continuance, setting forth that the party is informed and verily believes, is insufficient if it does not contain the name of the informer.

This was a petitory action, in which both parties set up title to the land in controversy. The plaintiff set forth in his petition, that he was the legal owner, by virtue of a conveyance from Wesley Trahan and wife, executed on the 19th of June, 1812. That possession accompanied the sale which he held, until 1817, when he was interrupted. That the defendants were in possession without title, against whom he prayed a decree for the land, and damages for its deten-

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tion. On the record appeared a supplemental petition, in which the plaintiff set forth, that Trahan and wife, under whom he claimed, derived title from Zadock Brashears. This document bore no date of filing, nor did it appear put in by leave of the court.

One of the defendants (Sandiford) disclaimed title, and M'Mannus pleaded, first, the general issue; second, actual possession for more than twelve months, by virtue of a just and legal title; third, fraud and a want of consideration in the conveyance from Trahan and wife to the plaintiff; fourth, title from Gordon, in whom was vested the right of Zadock Brashears, the original grantee under the Spanish government; and, further, in case of eviction, he prayed judgment for the value of his improvements.

The plaintiff introduced, first, the act of sale, under private signature, from Zadock Brashears to Wesley Trahan and wife, dated May 3, 1811, and recorded on the 19th of August following; second, act of sale, under private signature, from Wesley Trahan and wife, to the plaintiff, dated the 19th of June, 1812, and recorded August 1st following, and proved that he took possession immediately after the sale from Trahan and wife.

On the part of the defendant, it was shown that the disputed premises had been sold by the sheriff, in 1817, to satisfy a judgment which one Davenport had obtained against Zadock Brashears and Wesley Trahan. That Kirkland became the purchaser, and, at a probate sale of his estate, it was adjudicated to Gordon, who conveyed to the defendant. The court below permitted the plaintiff to prove, that the defendant purchased with a full knowledge of the plaintiff's claim, but would not allow the defendant to introduce any evidence as to fraud or want of consideration, on the ground: first, that contracts recorded could not be attacked as fraudulent *ex parte*, and collaterally in a suit where the vendors, to neither of the deeds, were parties;

second, that the proper remedy would have been by action of nullity against the original contracting parties. To this opinion of the court, the defendant excepted, and also to the refusal of the judge to charge the jury :

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First, that before the promulgation of the new Civil Code, lands transferred by act under private signature, were subject to be seized and sold under execution issued against the ostensible vendor ; second, that parish judges had no authority to record acts under private signature, so as to give them date and validity against third persons, unless they were, previously to such recording, duly acknowledged by the parties ; third, that if the jury believed that no consideration was given by Wesley Trahan and wife, for the tract of land in contest, but should, on the contrary, believe, from the testimony, that it was intended by Zadock Brashears as a donation, it was a nullity, unless passed by authentic act and accepted in precise terms by the donees ; fourth, that it was incumbent upon the plaintiff to show, that the acts were recorded before the seizure and sale by the sheriff. There was a verdict for the plaintiff, and a motion for a new trial, on the affidavit of the defendant, that "he had been informed and believed" one, of the jury had been guilty of acts of misconduct. Motion overruled and the defendant appealed.

Turner, for appellant, made the following points :

1. There is error apparent on the face of the record in taking notice of a supplemental petition not filed, nor admitted by leave of the court and not answered.—8 *Martin*, N. S. 510.

2. The bill of exceptions taken by defendant should have been sustained, and the evidence as to fraud and want of consideration received.—*Starkie*, vol. 1, part 2, p. 126, sec. 15.—3 *Starkie*, part 4, p. 1300.—8 *Martin*, N. S. 475.—8 do. 95.—2, do. 13.—8 do. 565.—*Ibid* 396.—C. C. 1915 1914, 8 *Martin's* Old Series, 61 to 66.—8, N. S. 126. Old Code, p. 306, art. 228.

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3. Motion for a new trial improperly overruled.

4. The defendant having shown a possession of more than twelve months, under an authentic deed, is entitled to be maintained therein, as the plaintiff has shown no title in law sufficient to oust him.

Morgan, contra :

1. This court cannot reject the amended petition, because it appears the court below was requested to receive it, and no objection was made at the time.

2. The sale from Trahan and wife to the plaintiff, although an act under private signature, is good against the present defendant ; first, because it was accompanied by actual possession, from and after its date : second, because it appears to have been recorded before the sale made by the sheriff, and thus operated as public notice to all persons concerned, and gives date to the sale.—8 *Martin*, N. S. 674.

3. The defendant is not a possessor in good faith, and, therefore, not entitled to the value of his improvements.

4. The verdict of the jury is good as a general verdict. It gives to the plaintiff only the land, without allowing him, for the rents and profits, and it denies to the defendant the claim set up for the value of his improvements.

Porter, J., delivered the opinion of the court.

This is a petitiory action. In the petition, the plaintiff states his title to be derived from Wesley Trahan and Delia Trahan, who sold to him on the 19th June, 1812, and he further states, that he took possession at the date of the sale, and kept it up to the year 1817 : that at that time, he was interrupted in the enjoyment of the premises, and has been so ever since : and that, at this moment, the land is in possession of McMannus and Sandiford, the defendants. Res-titution of the property, and damages for its detention, are prayed.

Sandiford answered, by disclaiming title, and stating that he was the overseer of McMannus.

McMannus pleaded the general issue—possession of more than twelve months by virtue of a bona fide title—fraud in the conveyance under which the plaintiff holds—want of title in the persons who made it—and, further,

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That the land he occupies made a part of a larger tract, granted to one Zadock Brashiers : that in November, 1816, a final judgment was rendered against Brashears and Wesley Trahan, under whom an execution issued and the premises in dispute were seized and sold, and that they were bought by William Kirkland, whose title is now vested in the defendant.

The plaintiff afterwards attempted to amend his petition, and it appears that he made a motion in court to obtain permission to do so.

No order was taken on this motion, nor does the *amended petition* appear to have been ever filed with the clerk. How the document which is entitled such, got into the record, we do not know, but it cannot be considered as a part of the pleadings. Amendments are not a matter of course. The leave of the court must be obtained, before they can be filed—and without that leave or the consent of the adversary, they make no part of the proceedings in the cause, and cannot be noticed here.

Amendments are not matters of course, and cannot be made without leave of the court or consent of the party—if they cannot be noticed.

But the admission or rejection of this amendment, does not materially affect the rights of the parties. It makes a part of the defence, that Wesley Trahan, who sold to the petitioner, had no right in the soil as derived from the United States. To this it is answered, that the record establishes the fact, of both plaintiff and defendant claiming under the same person, and that the latter cannot be permitted to dispute his own title. The correctness of this argument, in its application to the case before us, has been resisted, on the ground, that the pleadings do not shew the parties claim under the same persons. In our judgment, it is immaterial whether the pleadings shew the fact or not, provided the

If it appear from the pleadings or evidence, that

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both parties claim
under the same ti-
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evidence does. It certainly would have been more regular for the petitioner to set out the different conveyances from the grantee of the land down to those under whom he held, though we are not prepared to say it was indispensable. But the irregularity, if it was one, was cured by the introduction of evidence without any opposition being made, on the ground of variance from the allegations in the petition. We conclude, therefore, the judge below did not err in deciding that the right of Brashears, under whom both parties claim; could not be a subject of inquiry in this suit. The facts of the plaintiff claiming under Trahan, who claims under Brashears, and that the defendant claims under a conveyance of the joint right of Trahan and Brashears, merely shew, that the parties reach the same source, through different channels.

The case appears to have been greatly litigated in the court below, and no less than fourteen bills of exceptions were taken on the trial. Our view of the case renders it unnecessary to express an opinion on them; for admitting the defendant was correct in those he took, in relation to the attempts to establish that the deed to the plaintiff was a public act, still we think the plaintiff must recover. He claims under a deed from Trahan and wife. The defendant sets up title under a sheriff's sale, subsequently made in virtue of a judgment against Brashears and Trahan. The first is attacked as fraudulent; and a great deal of the difficulty which attended the investigation in the inferior court, arose from an attempt to sustain that allegation. We think there is full and satisfactory proof on record, free from all technical objections, that the act under *sous seing privé*, was made at the time it purports, and that the possession under it was such as gave notice to the world. Under these circumstances, it would be doing worse than a vain thing to demand the cause; it would be accumulating costs unnecessarily on the defendant. The creditor at whose suit the property

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was sold, was not authorised to treat that conveyance as a nullity, and seize and sell the property. If the alienation to the plaintiff was in fraud of his rights, he should have brought an action to set it aside.

There are, however, one or two bills of exceptions which it is proper to notice.

The defendant requested the judge to charge the jury, that if they believed the deed from Brashears to Trahan and wife, was a disguised donation, the same was a nullity unless passed by authentic act, and accepted in precise terms by the donees. This charge the judge refused to make, and an exception was taken to his refusal.

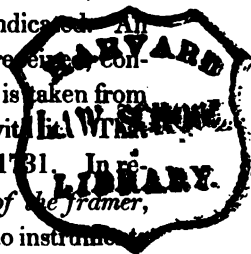
In our opinion he did not err. The opinion called for, embraced the question, whether a donation under the form of an onerous contract, was null and void. This our code has not said. It does not declare that *all donations* shall be made by public act, and accepted in precise terms under *peine de nullite*. It says, *all acts containing donations*, shall be null and void, unless they pursue the form indicated. An instrument which expresses a sale for value received, contains no donation. This article of our Code is taken from the 931st of the Napoleon, and corresponds with it. It is again *verbatim* a copy of the ordonnance of 1731. In relation to the latter, we have the interpretation of the *framer*, Chancellor D'Agusseau, that it did not apply to instruments which had the form of an onerous contract. That interpretation, though adopted at first with some hesitation in reference to the Napoleon Code, has finally been received and is now the settled jurisprudence of France. The act, it is true, may be attacked if it be in fraud of creditors; or it may be reduced, if more than the disposable portion is given; but it is not void, because there is a failure to express that a donation is made. When we consider the particular phraseology of the enactment, it is difficult to come to any other conclusion. The prohibition does not extend to the

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property is sold,
cannot treat the
conveyance as a
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A donation un-
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contract, but to the instrument which is the evidence of it. If the legislature had intended to prohibit all donations, except those by public act, it must be presumed they would have said so, and would not have limited it to *acts which contain them*. A benefit, disguised under the form of an onerous contract, is an indirect donation, and it is not contained in the act but arises from evidence *dehors* it. *Toullier, Liv. 3, tit. 1, cap. 6, No. 474. Ibid Liv. 3, tit 2, cap. 4, Nos. 172 and 476. Œuvres D'Agusseau, no. 9, 361. Sirey, vo. 15, 42—ibid 16, 383—ibid 18, 383.*

An affidavit for a continuance setting forth that the party is informed & verily believes, is insufficient if it does not contain the name of the informer.

Annexed to the motion for a new trial was an affidavit of the defendant, that he had been informed and believed, some of the jury had been guilty of acts of misconduct. The refusal of the judge to grant a new trial, on this allegation, is one of the errors complained of. We think, however, he did not err. The affidavit does not disclose the name of the person who gave the information, and it is indispensable it should. Such was the law previous to the passage of the Code of Practice, and nothing in that work has changed it. The affidavit must be sufficiently specific to enable the state to prosecute the affiant for perjury, if he should swear falsely. It would be impossible to do so where the oath is, *he has been informed and believes*, without saying who informed him; for the allegation is not susceptible of being disproved—3 *Martin*.

We think the judgment is erroneous in concluding the party on the question of fraud; and it is silent where it should not be, on a matter put at issue by the pleadings; namely, the value of the improvements, and the rents and profits.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered and decreed, that the petitioner do recover of the defendants the land claimed in the petition, reserving, however, the right of the latter, to show fraud in

the sale from Trahan and wife to the petitioner, if an action be instituted to annul the conveyance on that ground. And it is further ordered, that the case be remanded to the court below, for an inquiry into the value of the improvements put on the premises while the defendant was in good faith; and that, should the court decide that good faith terminated before judgment, that the value of the rents and profits be then investigated. The appellee to pay the costs of this appeal.

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MORANO vs. THE MAYOR ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The City Council have the power to establish markets and to provide for the cleanliness and salubrity of the city.

They have an undoubted right to prevent the violation of any ordinance they may pass in relation to the markets.

They have the right to confine the sale of oysters to certain designated stands, and to prevent their being sold at any other.

By an ordinance of the City Council, of the 24th August, 1829, the sale of oysters is restricted to certain designated stands within the city and faubourgs, and the sale of them elsewhere, expressly prohibited under pain of a certain penalty.

The plaintiff having violated this ordinance, by the sale of oysters on property which he had leased for that purpose, was sued by the defendants, and judgment rendered against him. He brought this suit to recover damages for the alleged wrongful interference of the defendants, and prayed they might be perpetually enjoined from disturbing him in the sale of wholesome oysters on the property which he had leased for that purpose. On the trial of the cause, the court *a quo* charged the jury, that the city corporation had a right to assign places for the sale of oysters, and to prohibit their being sold elsewhere; and, further, that the plaintiff had no cause of action.

To this charge the plaintiff took his bill of exceptions.

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There was a verdict and judgment for the defendants, and the plaintiff appealed.

Preston, for appellant, contended :

1. The District Judge charged the jury erroneously in saying, that the corporation of New-Orleans had a right to prevent the plaintiff from selling oysters on his private property.

2. The corporation of New-Orleans have no power granted by their charter, to pass an ordinance to that effect.

Moreau and Soule, for appellees.

Martin, J., delivered the opinion of the court.

The plaintiff states he rented two small pieces of ground, in the city of New-Orleans, as stands for the sale of wholesome and sound oysters, and the defendants have sued him in several instances, and recovered sundry sums of money as fines, under an ordinance of the City Council of the 14th August, 1829; and, by repeated suits for such fines, intend to harrass and distress the plaintiff, so as to deter and prevent him from continuing to gain his livelihood by selling oysters—that the ordinance is illegal and unauthorized by the charter. He prayed he might have judgment against the defendants for five hundred dollars, and that they might be perpetually enjoined from thus disturbing him in the sale of sound and wholesome oysters.

The defendants denied the plaintiff's right of action, and averred the Council had not exceeded its legitimate powers in passing the ordinance.

There was a verdict and judgment for the defendants, and the plaintiff appealed.

At the trial, the court charged the jury, at the request of the counsel for the defendants, that the corporation had the right to prevent the sale of sound oysters, by individuals, on their private property. To this opinion the plaintiff's counsel took a bill of exceptions.

The case rests entirely on the validity and legality of the

ordinance. The plaintiff's counsel has urged that corporations, being mere creatures of the legislature, cannot exercise any powers except those given by their charters, or subsequent acts of the legislature; and that, in the present case, the City Council exceeded their powers.

It appears to us the District Court did not err. The City Council has the power to establish markets, and to provide for the cleanliness and salubrity of the city.

In establishing markets they designate certain spots or places for the sale of certain articles of provision; in doing so they facilitate the people in the purchase of provisions of first necessity, by confining the sale of them to particular places and hours of the day—and they facilitate the inspection of provisions; and by the hire of stalls they raise money to defray the expenses of building market-houses, and pay the salaries of officers they appoint to prevent the sale of unsound provisions—and they have an undoubted right to prevent the violation of ordinances they may pass in establishing markets.

It appears they have established several stands on the levee for the sale of oysters, and they farm out these stands.

The ordinance complained of, is an auxilliary one to that establishing these stands. The Council thought it proper to confine the sale of oysters in the city to these stands.

No one would rent a stall to sell meat in the market-house, or any of these stands, if butcher's meat or oysters, could be sold in a temporary stall near the market-house, or elsewhere, or sell oysters at any other stand.

The ordinance prevents the keeping of heaps of oysters elsewhere than in those stands. In this the salubrity of the city seems to have been considered by the Council. Heaps of oysters having a great tendency to putrefaction,

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs

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MORANO
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The city council have the power to establish markets, and to provide for the cleanliness and salubrity of the city.

They have an undoubted right to prevent the violation of any ordinance they may pass in relation to the markets.

They have the right to confine the sale of oysters to certain designated stands, and to prevent their being sold at any other.

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vs.
HIGGINS.

21	220
46	539
21	220
48	479

BAINES vs. HIGGINS.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,
THE JUDGE THEREOF PRESIDING.

A receipt of a date posterior to the *contestatio lites*, is no evidence of the existence of the facts alleged by the pleadings against either of the parties to the suit.

Although no answer be put in, a supplemental petition cannot be filed without leave. To supply the deficiencies of a petition is to amend, and no amendment can take place in the pleadings without the leave of the court or the consent of the adverse party.

It is not too late after the jury are sworn, to strike from the record documents irregularly filed.

Evidence that a document had been seen among the papers of a deceased person, searched for and could not be found, and that some of his papers were lost, is not sufficient to enable the party to give parol proof of its contents.

The Court should charge the jury not to notice a supplemental petition irregularly filed—otherwise, if no objection be made to the introduction of evidence in support of its allegations.

A plaintiff's warrantor is an inadmissible witness in support of the plaintiff's title.

This cause was remanded without an inquiry into the merits upon certain bills of exceptions taken by the defendant, and stated at large in the opinion of the court delivered by

Martin J.

The counsel of the defendant and appellant has called our attention to several bills of exceptions :

1. At the trial of this case, it being necessary to prove the sale of a slave, in the year 1814, by Robinson to Walsh, a receipt of the consideration money, dated May 22, 1830, the day of the trial was offered in evidence. The introduction of it was opposed by the defendant ; the objection overruled and a bill of exceptions taken.

2. After the jury were sworn, the defendant moved the court to order the striking off a supplemental petition, filed by the plaintiff, after the original one, without leave of the court or the defendant's consent, calling Lobdell in warranty.

The motion was overruled and the defendant took a bill of exceptions. Eastern District.
February 1831.

3. The defendant objected to the introduction of parol evidence of the contents of a bill of sale, *sous seing privé* of a slave, on the ground that the loss of it was not sufficiently proven. The objection was overruled and a bill of exceptions taken.

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4. The defendant's counsel requested the court to charge the jury, that the supplemental petition, the answer thereto, and the evidence in support of the allegations in these documents, should be disregarded by them. The court refused to give the charge, and a bill of exceptions was taken.

5. The plaintiff offered as a witness against the defendant Lobdell, called in as a warrantor. His admission was objected to—the objection overruled and a bill of exceptions taken.

1. Robinson's receipt being of a date posterior to the *contestatio lites*, or issue joined, could not be evidence of the existence of the facts alleged by the pleadings against either of the parties to the suit. He ought to have been sworn and cross-examined, and the court erred, in our opinion, in receiving his receipt in evidence.

A receipt of a date anterior to the *contestatio lites* is no evidence of the facts alleged by the pleadings against either of the parties to the present suit.

2. The supplemental petition was filed before the answer was filed; but we do not think this circumstance authorized its being filed *without* leave. To supply the deficiencies of a petition is to *amend* it, and we think no amendment can take place in the pleadings without the leave of the court, or the consent of the adverse party. The Code of Practice, 419, authorizing the amendment of the petition, "*after* issue joined," has given rise to the idea, that the last three words have no meaning, unless there be some difference as to amendments *before* and amendments *after* issue joined; and if there be, the difference is either that there is no amending *before*, or the amendment then requires neither leave or consent. Hence it is urged, as *before* issue joined

Although no answer be put in, a supplemental petition cannot be plead without leave —To supply the deficiencies of a petition is to amend, and no amendment can take place in the pleadings without the leave of the court or the consent of the adverse party.

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amendments ought to be granted more easily than *after*, as they are then attended with less trouble and delay. We ought to adopt the latter alternative and allow amendments *before*, without leave or consent.

We think the reasoning inconclusive. The French text of this article of the code presents the issue joined as presenting no obstacle to an amendment: "Quoiqu'il y ait contestation en cause, le demandeur peut se faire autoriser par le juge à amender sa petition." We think we give its full effect to every word of the English text, if we take the meaning of the legislature to be, to allow amendments, with leave or consent, even after issue joined.

We are of opinion the supplemental petition was irregularly filed without leave or consent.

It is not too late after the jury are sworn to strike from the record documents irregularly filed.

But the motion to strike it off was held to be too late, as the jury were sworn. We are of opinion, it was then still time, because it was necessary to remove from their consideration whatever had been irregularly put on the files of the court.

3. The loss of the bill of sale was said to have been proven by Butler, who deposed he had *seen* it among the papers of the deceased, either *before* or *since* the vendee's death—that he was the vendee's executor, and some of the papers of the estate, particularly a certificate of bank stock, was lost—That Dabney examined the papers of the estate, to find the bill of sale.

Evidence that a document had been seen among the papers of the deceased, searched for, and could not be found, and that some of the papers was lost, is not sufficient to enable the party to give parcel proof of its contents.

We are of opinion there was not sufficient evidence of the loss. Every fact sworn to, may and we believe to be true, and notwithstanding, the loss may not exist.

We think the judge erred in refusing to charge the jury not to notice the allegations in the supplemental petition. We have already said it made no part of the regular pleadings.

The court should charge the jury not to notice a supplemental petition irregularly filed—otherwise, if no objection be made

As to the evidence, in support of these allegations, it does not appear to have been objected to, and the court did not err, in refusing to instruct the jury to disregard it.

5. Lobdell, the plaintiff's warrantor, was certainly inadmissible as a witness, in support of the plaintiff's title. Eastern District, February 1831.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and the case remanded, with directions to the judge not to admit Robinson's receipt or acknowledgment in evidence—to allow the striking off of the supplemental petition—not to admit parol evidence of the contents of the bill of sale, till the loss of it be better proven, nor to receive the warrantor's testimony in support of the title. The appellee paying costs in this court.

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to the introduction of evidence in support of its allegation. A plaintiff's warrantor is an inadmissible witness in support of the plaintiff's title.

FLOWER vs. HAGAN & CO.—JONES, APP'T.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A co-defendant, although he reside in a different parish, must answer in that where the suit is brought.

Nothing prevents a suit being brought for the surrender of a note not sued on.

The defendants, residing in different districts, were made parties to this suit, the object of which was to obtain the cancelling of a note which the firm of W. & D. Flower had executed to Hagan & Co., and which Jones was attempting to off-sett against a judgment rendered against him at the suit of the Messrs. Flowers, in the parish of St. Tammany.

The petition stated that the note came into the possession of Jones, long after it was due, fraudulently and without consideration. That Hagan & Co. were the real owners, and indebted to the firm of W. & D. Flower. Service of the petition and citation was made upon Jones, who failing to appear, a judgment by default was taken, which was afterwards made final, and from which Jones appealed.

Pierce, for appellant, assigned for error apparent :

1. The appellant is parish judge of the parish of St. Tammany—and should be so known to the judge, and that he had there his domicil.—Article 162 of the Code of

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Practice, says that one *must* be sued before his own judge, i. e. before the judge of the place of his domicil, and this case does not come within the only exceptions now allowed.

—C. P. art. 163, 164, 165, 166, 167.

2. The action is not maintainable—the suit is to have a note returned, which is not sued upon.

Hennen, contra :

1. The appellant, although residing out of the first judicial district, was legally cited and bound to answer, as his co-defendants resided in the first judicial district.

2. He did not decline the jurisdiction of the court.

Martin, J. delivered the opinion of the court.

Jones, the appellant, assigns as error apparent on the face of the record :

1. That he is judge of the parish of St. Tammany, and should, as such, be known to the judge of the first district, and he has his domicil in said parish. He, therefore, is sueable there only—Code of Practice, 162—as he does not come within any of the exceptions in the Code.

2. The action is not maintainable, being brought for the surrender of a note, which is not sued on.

A co-defendant although he reside in a different parish must answer in that where the suit is brought.

The appellant did not plead his commorency. If he had, it would have been of no avail, as his co-defendants were residents of the parish in which the suit was brought.

Nothing prevents a suit being brought for the surrender of a note not sued on.

Nothing prevents a suit being bro't for the surrender of a note not sued on.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

SAME CAUSE ON A REHEARING.

Nothing can be assigned as *error of law* which could have been cured by evidence legally given at the trial.

Without a statement of facts the Supreme Court cannot know what evidence was introduced, and are bound to presume, until the contrary is

shown, that the judgment below was rendered under those circumstances, Eastern District, and with that evidence which made it correct and legal. February 1831.

Pleading to the merits is only one way of giving jurisdiction to the court. Issue joined on any other matter, unless where the incompetency of the judge is absolute, will have the same effect.

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Jones, appellant.

Porter, J., on a rehearing, delivered the opinion of the court.

This case was decided last Summer just before the adjournment of the court, but a rehearing has been granted on the application of the appellant.

We have heard his counsel, who contends that on an obligation which is *joint* and *several*, there is no *joint* remedy where the parties live in different parishes.

We waive the final settlement of this question, until a case arises which will render the examination and decision of it necessary.

The present is not such a one. On the last argument, the counsel for the appellee has drawn our attention to the manner the cause comes before us. There is no statement of facts, and the appellant relies alone on an error of law appearing on the face of the record.

That error is, that the defendant, Jones, is sued in a different parish from that in which he resides.

It is the settled jurisprudence of this court, that nothing can be assigned as *error of law*, which could have been cured by evidence legally given on the trial, and this for the most obvious reason. Without a statement of facts, we cannot know what proof was adduced, and we are bound to presume, until the contrary is shewn, that the judgment below was rendered under those circumstances, and with that evidence which made it legal and correct.

The application of this rule to the case now under consideration, shews at once the impossibility of reversing the judgment.

Our legislature has adopted the principle of the Spanish law, that a judgment by default presents a species of the

Nothing can be assigned as error of law which could have been cured by evidence legally given at the trial.

Without a statement of facts the supreme court cannot know what evidence was introduced, and are bound to presume until the contrary is shown, that the judgment below was rendered under those circumstances, and with that evidence which made it correct and legal.

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contestatio litis, and hence the Code of Practice requires proof to be adduced, before the judgment can be made final.

Now it is clear, proof might have been legally introduced in this instance, to enable the court below to give judgment against the defendant. Its jurisdiction over the *subject matter* is not contested. The alleged defect is in relation to the *person*. The personal privilege might be waived, and evidence of the consent to let the court decide on the matters arising out of the petition, might have been given. Counsel, indeed, have read from the Code of Practice, an article to shew, that nothing but a plea to the merits will waive a defect as to the jurisdiction; but that article, taken in connexion with others in the same work, shews that pleading to the merits is only one way of the defendants consenting to give the court jurisdiction. Issue joined on any other matter, unless where the incompetency of the judge was absolute, would have the same effect, and express consent would be stronger than either.—*Code of Practice* 93, 333.

Pleading to the merits is only one way of giving jurisdiction to the court. Issue joined on any other matter, unless were the incompetency of the judge is absolute, will have the same effect.

The probability or improbability of such proof having been given, does not affect, in the slightest degree, the soundness of this conclusion. If it could have been given, legally giving it is sufficient.

Our former judgment, therefore, does not require to be changed.

PRESTON vs. ZABRISKY.

APPEAL FROM THE COURT OF THE CITY AND PARISH
OF NEW-ORLEANS.

It behooves the plaintiff in a possessory action, to show that he possessed as owner, or that as *usu fructuary*, he was entitled to the use, or had a real right growing from such real estate or slaves.

This suit was brought to recover the possession of two slaves, of which the plaintiff alleged he had been fraudulently dispossessed by the defendant. It appeared from the evi-

dence, that the defendant had sent the slaves to the plaintiff, and at the same time received from the latter three others. The slaves remained with the plaintiff about two months, when they were ordered back by the defendant, to whom they returned. Judgment of nonsuit, from which the plaintiff appealed.

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Hoffman for appellant :

1st. The evidence establishes clearly, that the plaintiff possessed as owner, and that he was fraudulently dispossessed by the defendant.—*Code of Practice* 47, 53, 54.

2d. No evidence of title could be offered in this action.

Morse, contra :

1st. The evidence shows that the slaves were on trial, and were in possession of plaintiff, conformably to article 49 C.P.

Martin, J., delivered the opinion of the court.

This is a possessory action for two slaves, which the plaintiff alleges were fraudulently taken from his possession. The general issue was pleaded ; there was judgment as in the case of a nonsuit, and the plaintiff appealed.

The record shows that the slaves were sent to the plaintiff by the defendant, who, a few weeks after sent orders, by a black boy, to them to return home, which they did.

The evidence does not enable us to discover for what purposes the slaves were sent to the plaintiff. During the argument his counsel has urged, they were sent in exchange for one or more others, sent by the plaintiff to the defendant ; while the latter's counsel has urged, an exchange was contemplated, and the slaves reciprocally sent on trial.

It behooves the plaintiff to have shown that he possessed the slaves as owner, or *usu fructuary*, that he was entitled to their use, or had a real right growing from these slaves.—*C. of Prac.* 47.—One year's peaceable possession, or a possession of less than one year and on eviction by fraud or violence.—*Id.* 40, 2.

It behooves the plaintiff in a possessory action to show that he possessed as owner, or that as *usu fructuary* he was entitled to the use, or had a right growing from such real estate or slaves.

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No possession in the plaintiff, of the nature of that required by the Code has been shown. His seems to have been a mere precarious possession. It lasted but a few weeks. The defendant would not have been guilty of fraud had he ordered the slaves home, and he cannot be said to have been so, by sending orders to them to return, by a black boy. He is a free colored person, and may have been deterred from going to the plaintiff's house to order his slaves home, by the apprehension of giving rise to some altercation.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

*THOMPSON ET AL. FOR THE USE OF DECALA vs. THE
MISSISSIPPI MARINE AND FIRE INSURANCE COMPANY.
APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.*

A cause will not continue without the oath of the party that due diligence has been used.

To support an allegation of the breach of warranty, a judicial sentence is not indispensable; but to supply the want of it, other evidence must prove that the acts were illegal, and that forfeiture followed them, or would have followed them.

The introduction into Mexico of prohibited articles produces their forfeiture, but no penalty is inflicted on the vessel which carries them.

Illicit trade is that which is made unlawful by the laws of the country where it is to be carried to. That trade which the officers of the government may choose to designate as illegal to suit their own purposes, cannot be recognized as such by the tribunals of other countries.

A warranty against illicit trade is forfeited only by the vessel being engaged in an illicit trade, which renders her liable to seizure. If the illicit trade be not the ground, but only the pretext, there is no breach of warranty.

If on the vessel being seized the captain be thrown into prison, and on his being released makes immediate claim for her, and is threatened with death if he persist, he cannot be charged with negligence.

If the difficulty of recovering the vessel be great, and the prospect of getting her into possession so as to pursue the voyage feeble, an abandonment may take place.

This was a suit to recover as for a total loss, under a policy of insurance upon the schooner *Rebecca and Eliza*, on a

voyage from New-Orleans to Tampico. The policy contained the following clause: "Warranted by the assured free from any charge, damage, or loss which may arise in consequence of having been engaged in illicit or prohibited trade at any time whatsoever." The defendants resisted the claim upon the following grounds:

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1. Because the captain, for whose use the suit was brought, caused to be shipped on board the vessel, a variety of merchandise which he knew to be contraband and prohibited by the Mexican government at Tampico.

2. Because upon his arrival at Tampico, he sold, or attempted to sell the prohibited cargo to the Spanish royal forces, then at war with the Mexican government, which was the true cause of the loss of the vessel—and, further, that he did not labor, sue for, and travel for the recovery and possession of the vessel, as he was bound to do by the terms of the policy.

It appeared from the testimony in the cause, that when the policy was subscribed, it was a matter of public notoriety, that the port of Tampico was in possession of a Spanish invading force, and that a proclamation of the commanding general, declaring the port free for provisions (with the exception of flour) had been published in the gazettes of New-Orleans—

That between the departure of the vessel from New-Orleans, on the second of September, and her arrival at Tampico on the fifteenth, the port had been retaken by the Mexicans, who hoisted Spanish colors to decoy in vessels that were laden with provisions—That the Rebecca and Eliza was seized by a military force, dismantled, and the captain and part of the crew imprisoned—That the vessel and her cargo, consisting of corn and other articles of provision, was sold at auction without any judicial proceedings—That the introduction into Mexico of prohibited articles produced *their* forfeiture, but not that of the vessel.

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It further appeared, that the captain upon his release from prison, applied to the commander in chief for the restoration of his vessel, and was ordered, under the pain of death, to desist from any further application.

When the cause was called for trial, the defendants moved for a continuance on the ground, (unsupported by affidavit) that a commission had not been returned although due diligence had been used in forwarding it to Tampico. The court overruled the motion, and the defendant took his bill of exceptions. There was a verdict and judgment for the plaintiff, and the defendants appealed.

Morse, for appellants, made the following points :

1. The exception to the opinion of the judge *a quo*, refusing to grant a continuance should be sustained, and the cause remanded for a new trial.

2. The judgment of the court *a quo* should be reversed, and judgment rendered in favor of the appellants for the following reasons :

1. It is in evidence that the appellee has broken his covenant of warranty in entering the port of Tampico with a contraband and prohibited cargo of provisions, for the purpose of illicit trade.

2. That the seizure and detention of the vessel was the consequence of such illegal conduct on the part of the assured, and attributable to his fault, negligence, or misconduct.

3. That the assured did not use the necessary precaution in entering the port of Tampico, in attempting to cross the bar without a pilot, whereby the vessel was run ashore.

4. The assured did not labour or sue for the recovery of the vessel as he bound himself to do, but abandoned the same illegally, thereby converting a *partial* into a total loss, by his own fault and negligence. This is not a case of loss of vessel or voyage that will authorize an abandonment.

Preston, contra :

1. There was no intention on the part of the captain to engage in unlawful trade. He did not even know that the port was in possession of the Mexicans until the vessel was seized. To cause a forfeiture, there must be the intention to engage in illicit trade.—2 *Gallison*, 210, 211.—*Droit Maritime*, art. 1884.

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2. If the unlawfulness of the trade ceases before capture, the vessel cannot be condemned.—6 *Robinson's Reports*, 390.—2 *Gallison*, 215, 216.—3 *Robinson*, 168.—3 *Mason's reports* p. 6.

3. The cargo, consisting of provisions, was not contraband of war ; 1st. Because Tampico was neither blockaded nor besieged—on the contrary, it was possessed by three thousand regular troops. The speedy capitulation of the invading army, though it occurred, could not have been anticipated. 2d. The provisions were not intended for the army exclusively, but for the inhabitants generally, whether natives or foreigners.

4. The progress of civilization has established as a principle of the law of nations, that provisions are not contraband of war, unless intended for the immediate relief of an army or navy, or blockaded or besieged town, put to the greatest straits by its opposing belligerent force.—*Wheaton on captures*, 178, 179, 180.—*Bynkershook*, 68, 69, 73.—82.—*Azuni*, vol. 2, 146, 150.

This principle has been engrafted into most of the modern treaties, and particularly into those made by the United States, and the United States have invariably stipulated that the vessel should not be condemned, even if she had on board contraband goods.—*U. S. Laws*, vol. 7, p. 656.—*Colvin's Dig. Ibid*, 684.—*Laws U. S.* vol. 6, appendix p. 18.—*Ibid*, vol. 2, p. 483, 4.—*Ibid* 526.

5. It is urged in defence that the vessel was carrying provisions to Tampico, in contravention of the municipal regulations of the country. The case of *Smith vs. the Insur-*

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ance Company, 6 Wheaton's Reports, shews the legality of trading with a port which is only temporarily open under insurgent authority, although in violation of the municipal regulations, that had been established in the country by the preceding government. The principle must be the same, if *vice versa*, the municipal authority is subverted by invasion. In the present case, the trade was not illicit as to the existing authority in Tampico, but was invited by the actual government, which, at the time, wore the aspect of considerable permanence. If the Mexican authority had existed, it is proved by many witnesses, that no law subjects the vessel to condemnation for carrying provisions there in violation of municipal regulations.

6. The vessel was not condemned by a judicial tribunal, but seized and disposed of by a military force. The constitution of Mexico and her treaties, show that regular maritime courts are established for the trial of all breaches of the commercial regulations of that country. Without a legal condemnation, the assured is presumed to be innocent of a breach of those regulations, and the capture and detention of his vessel unlawful. The insurers are, therefore, liable. 6, *Martin's Report*, N. S. p. 12, 14.

Porter, J., delivered the opinion of the court.

The plaintiff's claims as for a total loss, under a policy of insurance upon the schooner *Rebecca and Eliza*, on a voyage from New-Orleans to Tampico. There is a warranty annexed to the policy freeing the assurers from any loss, damage or charge, which may arise in consequence of having been engaged in illicit or prohibited trade, at any time whatsoever.

The defendants pleaded their exemption from responsibility.

Because the captain, for whose use the suit is brought, suffered to be shipped on board the schooner a variety of

merchandise, produce or provisions, which were contraband and prohibited by the Mexican government.

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Because he attempted to trade or sell the same on his arrival at Tampico, to the royal forces then at war with the Mexican government. In consequence of which, the vessel was exposed to seizure and condemnation by the laws of Mexico.

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And because the plaintiff did not labour, sue for, or travel, as he was bound to do by the terms of the policy, for the preservation, safeguard and recovery of the vessel.

During the late invasion of the republic of Mexico by the Spaniards, the port of Tampico fell into their possession, and the commander in chief issued a proclamation, declaring it free for provisions, with the exception of flour, which was made subject to a duty. The plaintiffs, profiting by this permission, loaded the schooner named in the policy, and despatched her for that place. Before she reached there the fortune of war had made it change masters. The Mexican forces had recaptured it. The Spanish flag, however, was still left flying, and served as a decoy to vessels which approached the harbour with cargoes of provisions. Deceived by it, the captain of the Rebecca & Eliza attempted to enter. She was immediately seized. The cargo was taken out and sold; the captain and crew imprisoned, and the schooner herself disposed of by auction, under the sanction and by the direction of the Mexican authorities.

On these facts, quite novel in this court, and not very common any where, the present case has arisen. A number of points have been made, and the cause has been carefully argued. We abstain from following counsel over the whole of the ground traversed by them, it is not necessary to do so, to arrive at a correct conclusion on the rights of the parties. Before we can reach the merits, a bill of exceptions, which stands in the way, must be disposed of.

On the 12th of December, 1830, a commission was ob-

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tained by the defendants to take evidence in Tampico, returnable in forty days. Depositions were taken under it and returned into court on the 13th of February.

On the 17th of the same month, a rule was taken on the plaintiffs, to shew cause why a second commission should not issue. This application was supported by the affidavit of the president of the Insurance Company, who swore that the testimony of witnesses, whose names were unknown to him, was material in the defence. The court made the rule absolute, and directed the commission to be returned in six weeks.

The 11th of May, the cause came on for trial, and the defendants moved for a continuance, on the allegation (unsupported by affidavit) that the commission had not been returned, though due diligence had been used in forwarding it. The court below refused to continue on this ground, and, in our judgment, did not err. The diligence should have been shewn by affidavit, and the oath of the party ought to have afforded a reasonable prospect, through his belief of the fact, that the testimony sought for would hereafter be procured, and within a reasonable time.

No judicial proceedings took place in relation to either cargo or vessel. They were taken possession of by military force, and sold without a decree of condemnation.

Whenever violence is used, and military authority is exercised on matters which, in all civilized countries, are the attributes of the civil power, a presumption is raised that the proceedings, even in their result, are not such as would have obtained the sanction of the law. The moral sense of mankind revolts so much at irregularities of this description, that the law is generally permitted to take its course, where it is believed the end sought for can be attained through it. In this instance, however, the defendants have rebutted that presumption in respect to the cargo introduced. The evidence on record satisfies us, that in a due

A cause will not continue without the oath of the party that due diligence has been used.

course of legal proceedings, the provisions found on board the vessel would have been condemned as contraband. But in relation to the vessel, a contrary conviction has been produced on our minds. There is a complete failure in the attempt to shew that the condemnation of the vessel was a legal consequence of the illicit trade in the cargo. Not only do *all* the witnesses interrogated on this point, disclaim any knowledge of the laws of Mexico, sanctioning such a proceeding:—one of them positively swears they do not authorize it.

As the presumption of correctness which, by the comity of nations, attaches to a judicial decree, does not extend to acts of military authority, where there is neither citation, hearing or sentence, it behooved those who claim exemption under those acts, to shew, that though irregular in their forms, they had the same result which a judicial proceeding would have had, or, in other words, to establish that the acts of the plaintiff were in contravention of the laws of the country, where the cargo was carried to. To support an allegation of the breach of warranty, a judicial sentence, is not indispensable, but to supply the want of it, other evidence must prove that the acts were illegal, and that forfeiture followed them, or would have followed them.

The evidence on the record exhibits a curious, and, what to many will appear, an imperfect legislation on this matter, by the republic of Mexico; but we are bound to decide the cause on the proof submitted. That proof establishes, that the introduction into Mexico of prohibited articles, produces their forfeiture, but that no penalty is inflicted on the vessel which carries them.

The seizure and sale of the schooner, in this instance, by the military commander of Tampico, was, therefore, in violation of the law of the country, and the question is, whether it was an illegal arrest and restraint by a foreign government, for which the defendants are responsible.

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They contend they are not, because the loss of the vessel was a consequence of the attempt to introduce, into the port of Tampico, articles prohibited by the laws of Mexico ; and this was a breach of the warranty by which it was covenanted, that the insurer should not be responsible for damage arising from illicit trade.

If the vessel was concerned in illicit trade, the plaintiffs cannot recover, and it becomes necessary, in examining the truth of this allegation, to ascertain what is illicit trade ?

We understand by it, all trade which is made unlawful by the laws of the country, where the object insured is bound to, or to be carried to. We know of no other definition, of which the terms are susceptible, that would be correct. That trade, which the officers of the government may choose to designate as illegal, to suit their own purposes, cannot be recognised as such by the tribunals of other countries. Such construction would afford temptations to acts of violence and fraud, and would be extending the meaning of the terms far beyond the contemplation of the parties. There being no judicial condemnation in this instance, the illegality of the trade and the legality of the seizure and sale in consequence of it, must be judged of by the court on the laws produced to us.

Now it has been shown, that the laws of Mexico do not make it illicit for a vessel to carry contraband goods. The penalty attaches alone to the merchandise introduced. No forfeiture is incurred by the ship. Her arrest and detention were, therefore, unlawful, as much so as if she had entered the port with goods that might be legally carried there. We can see no difference in the cases.

But it was further urged that the covenant of warranty is a condition precedent to the right of recovery, and though the loss may not have been incurred by that breach, the plaintiffs cannot recover.

This is true, provided *there was* a breach of the war-

warranty. But to what does that warranty extend? Certainly to nothing else but that which formed the object of insurance. If, indeed, the plaintiff had procured insurance from the defendants, on both vessel and cargo, and committed a breach in respect to either, these might be grounds for applying the principle invoked on the argument, because it made a part of the contract that no illicit trade should be carried on in relation to either. But the plaintiffs only covenanted against losses arising from his engaging in illicit trade with the vessel. Under the proof adduced to us, we have shewn she was not in the commission of an unlawful act. If the plaintiffs took on themselves the risk of the cargo, or if they insured it with another office, the defendants have no concern with the illegality or legality of introducing it into the country it was carried to. The stipulation in the warranty extends only to the subject matter of the insurance, which was the schooner; and if she could lawfully carry the cargo, there was no breach of the warranty in her doing so, no matter what became of it.

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This matter is susceptible of further developement, and as the case is of the first impression, we are desirous of expressing our views on it so fully, that we cannot be misunderstood. The words of the warranty are, "free from any damage or loss which may arise in consequence of having been engaged in illicit or prohibited trade." If reason alone was resorted to for the interpretation of this clause, it might, perhaps, conclude, that whether there was illicit trade or not was immaterial, provided no loss was incurred by it, and that the insurer ought not to be permitted to protect himself against the responsibility of the other risks in the policy which occasioned damage, by alleging a non compliance with matters that had no agency in producing this damage. If the thing was *res integra*, it might, perhaps, be thought, and justly thought, that as the words of the instrument made the insured warrant the insurer against *any loss* from illicit trade,

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it was sufficient for the former to shew that *no loss* had been incurred by it. But whether reason would sanction this conclusion or not, it is certain authority gives a much more extended effect to this clause in a policy of insurance. It holds promises of warranty as conditions precedent to the right of recovery, and hence it becomes immaterial what produces the loss, provided the condition is not complied with. The books abound with examples of this kind. They are so numerous it is unnecessary to cite them.

When engagements of this description exercise such an extensive influence on the rights of the insured and insurer, frequently too by a sacrifice of the equity of the case, it is important not to extend them to acts out of the contemplation and intention of the parties to the contract. We have already seen the vessel was not lost by being engaged in illicit trade: her seizure and sale were acts of violence of which that was the pretext. The defendants are, therefore, responsible, unless they can establish a breach of warranty, unconnected with the loss; or in other words, a non compliance with some condition which the plaintiff should have performed. They contend they do so, by shewing the plaintiff carried on an illicit trade in provisions to Mexico. But it appears to us, they might as well select any other act of the petitioners lives, and make it a failure of a condition precedent on which the right of recovery depended. If, indeed, that trade in provisions, furnished ground for the legal condemnation of the vessel, there would be a breach of

A warranty against illicit trade is forfeited only by the vessel being engaged in an illicit trade, which renders her liable to seizure. If the illicit trade be not the ground but only the pretext, there is no breach of warranty.

the warranty. For we understand the clause in the policy to mean, that the assured shall do no act of illicit trade that will expose his vessel to be legally condemned.—*2d Cranch Rep.* 232, 234. So long as he avoids acts of this description, the insurers have nothing to do with his illegal conduct in other matters. They are totally foreign to the contract; are neither expressed by its letter, nor embraced by its spirit.

We, therefore, think the plaintiffs are entitled to recover, but before we conclude, there is another point made by the defendants, which it is necessary to examine. They contend, that the abandonment was made too soon, and that the plaintiffs did not travel, labor, and sue for the recovery of the property, as they were bound to do.

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The last objection is easily disposed of. The captain was arrested and thrown into prison on the vessel being seized; as soon as he was liberated, he applied to the commander in chief to have the vessel restored. He was ordered to desist from the application, and threatened to be shot if he did not. Under these circumstances, with the experience the captain already had of the violence and tyrannical conduct of the authorities at Tampico, we think he was justified in making no further efforts to obtain possession of his schooner. We would doubt much, if the members of the company, under similar circumstances, would have urged their solicitations any further.

If on the vessel being seized the captain be thrown into prison, and on his being released makes immediate claim for her, and is threatened with death if he persist, he cannot be charged with negligence.

The objection as to the time of abandonment, is not, in our judgment, more solid. It is shewn the vessel was stripped of her rigging and dismantled, and rendered incapable of being navigated back, unless the articles taken from her had been restored. It is also in evidence, that she was since sold by the person who seized her.

An abandonment is a right given to the insured, to turn that into a total loss which would not otherwise be so. What circumstances, short of a total loss, will authorize it, has been a source of a diversity of opinion. Much depends on the degree of injury actually sustained, and upon the situation in which the ship is placed by the peril. If it is one of danger—if the difficulty of recovering her be great, and the prospect of getting her into possession, so as to pursue the voyage feeble, the authorities fully sanction the right to abandon. Such, we think, was the situation of the schooner protected by this policy. We cannot distinguish the case

If the difficulty of recovering the vessel be great and the prospect of getting her into possession so as to pursue the voyage feeble, an abandonment may take place.

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before us from a very modern one, in which it was held the plaintiffs were entitled to recover.—See 4 *Maule and Selwyn* 576. See also *Benecke on Ins.* 362, 2 *Burrowes* 685, 3 *Cranch* 357, 4 *Cranch* 45, 2 *Mason*, case of *Peele vs. Merchants Ins. Co.*, *Phillips on Ins.* 390 to 393—3 *Kent's Com.* 265.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

KEMP vs. KEMP ET AL.

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT,
THE JUDGE OF THE SECOND PRESIDING.

It does not follow that because the title is confirmed in the name of a third person, that the right, title, and interest to the land covered by it may not be in the person under whom it is claimed.

Where a party resorts to his action of warranty before a decision of a court of justice is made against him, he assumes and takes upon himself the burthen of proving that the land belongs to another.

On a partition of the succession of Janathan Kemp, a claim to 1280 acres of land, appraised at \$2400 in the inventory of the succession, was adjudicated to his widow at its appraised value. This claim had been entered in the office of the land commissioners, as two claims; one in the name of the deceased, and the other in the name of his son, Caleb Kemp. After the partition, two certificates issued, for 640 acres each—one in favour of the heirs of the deceased, and the other in the name of Caleb Kemp. The issueing of the last mentioned certificate, it was contended by the plaintiff amounted to an eviction, and authorized recourse in warranty against the co-heirs. It was admitted, that the 1280 acres of land was inventoried as the property of the deceased, and that Caleb Kemp was then of age and signed the inventory. The judge charged the jury, that the certificate, granted by the land commissioners to Caleb Kemp, for the claim preferred on his name by his father

2	240
117	806
2	240
118	617

Jonathan Kemp, did not amount to an eviction. There was judgment for the defendants, and the plaintiff appealed.

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Ripley, for appellees, urged the following points

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1. The judgment ought to be affirmed, because there was no legal eviction—the certificate of the land commissioners not amounting to one.

2. Jonathan Kemp's title was good to the tract of Caleb Kemp, inasmuch as Caleb Kemp signed the inventory, and thereby confirmed the title of Jonathan Kemp's succession.

Porter, J., delivered the opinion of the court.

This is an action of warranty, arising out of a partition made between the co-heirs of a succession. The plaintiff alleges an eviction of a tract of land set apart to her.

The cause has been twice tried in the inferior court. On the first trial, there was a verdict for the plaintiff—the court set it aside, and, on the second, the jury found for the defendant.

In the division of the succession, there fell to the plaintiff's share, two tracts of land of 640 acres each; the title to which had not then been recognized by the government of the United States.

They have since been acted on, and one of them has been confirmed to the representatives of the estate, the other to a son of the deceased, called Caleb Kemp.

This confirmation of title in his name, it is contended, amounts to an eviction, which authorizes recourse in warranty, against all the parties to the partition.

The judge who tried the cause below, was of a different opinion, and so is this court. It does not follow, that because the title is confirmed in the name of a third person, that the right, title, and interest, to the land covered by it, may not have been in the ancestor at the time his succession was opened. Where a party resorts to his action of warranty, before a decision of a court of justice is made against him,

It does not follow that because the title is confirmed in the name of a third person that the right, title and interest, to the land covered by it may not be in the person under whom it is claimed.

Where a party resorts to his ac-

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he assumes and takes upon himself the burthen of proving that the land belongs to another, and is, in truth, acting against the title he holds under. He should, therefore, make out a clear case. The court cannot but feel, that he may, peradventure, be setting up claims which those in whose name the right is vested, would not think of asserting. At all events, it is some presumption against their validity, that instead of prosecuting them, they leave the task of enforcing their rights, to a purchaser, from those claiming adversely to them. In the instance before us, the presumption arising from the confirmation in the name of one of the co-heirs, is much weakened, if not entirely destroyed by the fact, that the land said now to belong to Caleb Kemp, was inventoried as the property of the deceased, and that the same Caleb Kemp, then of age, signed the inventory, recognising it as such. Without any explanation, shewing there was error in the confession, or that it was produced by fraud, we cannot say there is a clear case of eviction by an outstanding title, which will supply the place of a judgment in due course of law.

This is our judgment on the facts of the case, and in the supposition that the buyer has a right of action in warranty, before he is evicted by a judgment. But we must remark, that, by the 2538 article of the Louisiana Code, it is very questionable, whether *after payment of the price*, as is the case here, the purchaser can maintain such an action, until a determination against him in due course of law. The article just referred to, declares that he can neither demand restitution of the price, nor security, while the suit is pending, and *a fortiori*, it would seem he should not be permitted to do so, before suit is brought.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

*DANIELS vs. BURNHAM.*Eastern District,
March 1831.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.


DANIELS
vs.
BURNHAM.

If A direct B to purchase a cargo, and draw for the amount on C., on the protest of the bills A is immediately liable for the amount of the cargo, although B produces not the protested bills.

The plaintiff, residing in Buenos Ayres, at the request of the defendant, purchased and shipped to the house of Z. Atkins, at Matanzas, of which the defendant was a partner, five hundred quintals of jerked beef. In the letter authorizing the purchase, the plaintiff was directed to draw for payment on Delaplaine and Co. of New York, with an assurance from the defendant, that his drafts would be honored. Under these instructions, the plaintiff drew two drafts on Delaplaine and Co., one for one thousand dollars, which was accepted and paid. The other for thirteen hundred and thirty-three dollars and twelve and a half cents, made payable to the order of Wm. P. Ford and Co., at sixty days sight, was dishonored and protested for non payment. It appeared that when the bills were drawn, neither Atkins or the defendant, had funds in the hands of Delaplaine and Co., or any authority to draw the bills. When the bill was protested for payment, it bore the endorsement of Wm. P. Ford and Co.

This suit was brought to recover the amount of the bill, with damages and interest.

The defendant pleaded the general issue; and, further, that the plaintiff was not the holder of the bill, and required the production of it on the trial. The plaintiff neither produced the bill, or showed that he had taken it up. There was a verdict and judgment for the plaintiff for the amount of the bill, with twenty per cent. damages, and interest for three years at six per cent.

The defendant appealed.

Hennen, for appellant.

Preston, for appellee,

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Porter, J., delivered the opinion of the court.

The defendant resided at Matanzas, in the island of Cuba, in the year 1825, and while there, addressed a letter to the plaintiff, then residing at Buenos Ayres, in which he requested him to purchase and ship to a mereantile establishment in the former place, of which the defendant was a member, five hundred quintals of jerked beef. He, in the same letter, directed the plaintiff to draw on the house of John F. Delaplaine and Co., for the purchase money of the beef. The plaintiff complied with the instructions, shipped the beef, and drew the bills of exchange. One of them, for one thousand dollars, was paid; the other, for one thousand three hundred and thirty-three dollars and twelve and a half cents, was refused acceptance, and this suit is brought to recover the amount, together with damages and interest. It appears that the bill was negotiated by the plaintiff, and, at the time of protest, had on it the endorsement of W. P. Ford and Co. It is proved, that at the time of giving directions to the plaintiff to issue the bills, neither the defendant, nor the firm of which he was a member, had funds in the hands of the drawees, nor any authority from them, to draw bills of exchange on their house.

To the petition filed in the case, which claims from the defendant the amount of the bill of exchange, with damages, interest and costs, the defendant has answered by a general denial, and an averment, that the petitioner is not the holder of the bill of exchange, and is required to produce it on the trial.

This he failed to do, or to shew that he had taken it up, and, the question is, whether, under these facts, he is entitled to recover. The judge charged the jury he was not; they disregarded, however, the instruction, and found against the defendant. He moved for a new trial, but the judge having, in the mean time, altered his views as to the plaintiff's right of action, refused the application, and gave judgment in

pursuance of the verdict. From that judgment the defendant has appealed. Eastern District.
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The defendant has received property from the plaintiff, for which he has not paid, and, in justice and equity, he should, do so. It was insisted, on argument, that the defendant was liable on the bill drawn on Delaplaine and Co., and that the holder of that bill might yet sue him. That the recovery in this action could not be offered as a bar to the claim of the indorsee.

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If this position be true, it is certainly a good defence ; but it is not. The defendant is not liable to the holders of the bill. They have nothing to do with him, nor he with them. It is a general rule, to which there are few exceptions, that no person is responsible on a bill of exchange, but those who are parties to it, and whose names are on it. . This rule extends, as well to bills drawn by agents as by others, and unless (with the exception of very particular cases) they sign in the name of the principal, he is not bound. So rigid is the commercial law on this subject, that if the factor or agent, in remitting the funds of his principal, takes a draft in his own name for the goods he has sold, he is personally responsible to the principal, for whose use he took it, in case the draft is dishonored. The cases are numerous on these points, and the authorities clear. Where an action was brought against two parties, on a note which one of them subscribed, the plaintiff was nonsuited, though he offered to prove the debt was contracted for, and had turned to their joint benefit. So in another case it was held, that a bill, drawn by one member of a firm, gave no right of action against the firm, though the draft was made for their benefit, and the funds raised had been applied to their use. And in another and still more analogous case to that before the court, where the agent of a company had drawn bills in his own name, and after acceptance had them discounted, the court to which the cause was first submitted, held the

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company responsible, because the bills had been drawn and discounted as their bills, and for their behoof. But on appeal, this judgment was reversed; the appellate tribunal considering, that the circumstance of the funds being raised by discounting the bills, was entirely a matter between the company and their agents, with which the discounters had no concern. The elementary treaties which recognize the doctrine just stated, except cases *particularly circumstanced*, but do not state what kind of cases would present these exceptions. They are, perhaps, those where the principal may have been in the habit of discharging debts contracted in his agent's name, and where this was known to the party taking the bill. But no exception at all approaching the case before the court, is to be found in the books. The only decision which seems to militate against it, so far as we have examined, is that of *Fern vs. Harrison*, and that case does not impugn the principle we have just recognized. The parties who sent an agent into market, to discount a note, were held responsible, because his representations made them so, and they had not limited his authority. Justice Bayley, in his treatise on bills, in commenting on it, considers that the case establishes, "that if no restraint is imposed on the agent, the principal may be bound by his guarantee; at least such guarantee will be a sufficient consideration to support a subsequent promise, by the principal, to pay the bill or note." So the case is understood by Thompson, a late writer on bills of exchange, who has benefitted the profession, by an excellent and learned treatise on them. This case was three times before the Court of King's Bench, and the judges were at first divided on it. In the instance before us, there is no evidence the bill was negotiated in the name of the defendant, or for his use. His signature is not to it. Nor is it stated, the bill was drawn on his account. No proof is furnished, that the agent ever gave to the payees the guarantee of the person to whose use the funds were ap-

plied. See *Chitty on Bills*, Ed. 1821, p. 36—3 *Ken's Com.* Eastern District, March 1831.
 18—*Thompson on Bills*, 244, 270 to 273—*Bayley on Bills*,
 48, 260—3 *Term Rep.* 757—4 *ibid* 177—2 *Camp*, 308—15
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An other ground of defence was presented. It was urged the plaintiff had obtained funds by negotiating the bill, he was directed to draw, and consequently had no claim on the defendant, until he took that bill up. The right of a party to revert to his original contract, under circumstances such as the case before us presents, without accounting for, or surrendering up, the security he may have received, is not well settled in the commercial law. The cases conflict. In some it has been held, that if the note or draft given does not turn out productive, nor prove to be what the party taking it had a right to presume it would, he may consider it as a nullity, and resort at once to his original contract. In others it has been decided, that if the draft or note has been negotiated, recovery cannot be had on the agreement, without producing the instrument, or giving some account why it is not produced. But in these cases, where the doctrine last mentioned has been acted on, the party sued had either given his own obligation, or was a party to the bill or note, by endorsement or otherwise. And the controuling reason for these decisions, appears to be, that if the instrument was not returned, the defendant might hereafter be sued on it, and thus made twice responsible for the same debt.—*Thompson on Bills*, 199—*Chitty on Bills*, 199, 126—*Bayley on Bills* 248 to 254—6, *Term Rep.* 52—4, *Espinasse*, 59.—3, *Cranch*, 311.

And such appears to be the only true reason on which such a conclusion can rest. For where the defendant has given what is of no value; or where, as in the case before us, he has given nothing, but merely induced the plaintiff to incur liability on his account; why should that which is valueless in itself, and which can never affect him, prove an

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If A direct B to purchase a cargo and draw for the amount on C, on the protest of the bills, A is immediately liable for the amount of the cargo, although B produces not the protested bills.

obstacle to the recovery of a debt, which, in equity and conscience, he should discharge. It was closely pressed on argument, that the plaintiff had got the money from the sale of the bill, and was seeking to obtain it a second time from the defendant. This may be true, though the circumstances of the case cast considerable doubt on it: but admitting it to be so, the plaintiff has, at least, incurred liability on the defendant's account, to the amount demanded from him. Then how stands the latter? He has got the property; has paid no one, and if he is not responsible to the plaintiff, is completely discharged from all responsibility; for *non constat*, that the want of the money now sued for, may not be the reason why the plaintiff cannot take up the bill. But waiving these considerations, the legal responsibility of the defendant arises from his having entered into a contract, which he has broken, and from his having received property for which he has not paid. The funds produced by the draft which was not accepted, can be considered in no other light, than money obtained by the drawer on his personal responsibility, as cash borrowed by him and applied to the defendant's use.

This opinion renders it unnecessary to express any on the bill of exceptions which appears on record. But there is error in the judgment below, for which it must be reversed. The jury have found for the plaintiff, not only the balance of the money due on the merchandise purchased by him for defendant, but also twenty per cent. damages on the bill, and interest thereon for three years, at six per cent. As the plaintiff has not taken up the bill, he cannot assert any claim *on it*. His right to recovery here, depends on his original agreement, considering the bill of exchange as a nullity. By that agreement there was \$ 1333 12 1-2 cents, due at the time this suit was commenced.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled,

and it is further ordered and adjudged, that the plaintiff do recover of the defendant, the sum of thirteen hundred and thirty-three dollars twelve cents, with costs in the court below—those of appeal to be paid by the plaintiff and appellee.

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RILEY vs. QUESTI.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE THEREOF PRESIDING.

Letters of administration make full proof of the party's capacity until they be revoked. They must have their effect, and the regularity of the proceedings on which they issued, cannot be examined collaterally.

Whatever right one may have against his co-heirs, he cannot avail himself of it to avoid paying for property bought at a sale of the estate.

This suit was brought by the administrator of Franchebois' estate, and to his right of action, the defendant filed the following exceptions: 1st, that all the heirs (of whom the defendant was one) being present and represented in the state, an administrator could not be appointed: 2d, that all the property of the succession having been legally disposed of, there was no object upon which to administer: 3d, that the appointment of plaintiff as administrator, if ever made (but which was expressly denied) issued irregularly and *ex parte*: and further, he pleaded a former suit and judgment for the same cause of action. The plaintiff produced his letters of administration, and the defendant offered proof of the allegations set forth in his exceptions; but the court refused to receive the evidence, on the ground that it could not look beyond the letters of administration, and inquire into the legality of the plaintiff's appointment. To this opinion of the court, the defendant excepted. There was judgment for the plaintiff, and the defendant appealed.

Morse, for appellant. *Eustis*, for appellee.

Martin, J., delivered the opinion of the court.

The plaintiff, administrator of Franchebois, claimed the

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price of several slaves, purchased by the defendant, at the sale of the property of the deceased.

The defendant denied the plaintiff being administrator, as all the heirs are present, and represented in the state, and the defendant is one of them; that the whole property had been administered at the period the pretended administration was granted. He pleaded a former suit and judgment for the same cause of action.

These exceptions being overruled, the defendant answered, that there could not be any recovery against him, as the heirs were not parties to the suit, and because he, as one of the heirs, instituted a suit against the others, in the Court of Probates, for his share of the estate, &c.

There was judgment for the plaintiff, and the defendant appealed.

Letters of administration make full proof of the parties capacity till they are revoked. They must have their effect, and the regularity of the proceedings on which they issued cannot be examined collaterally.

The exceptions were overruled on the plaintiff producing his letters of administration, and the court below refused leave to the defendant to introduce evidence in support of his allegations, being of opinion, that the letters of administration made full proof of the plaintiff's capacity as administrator, and till they were revoked, they must have their effect, and the regularity of the proceedings on which they issued, could not be examined collaterally in the present suit. In this opinion we concur.

Whatever right one may have against his co-heirs, he cannot avail himself of it to avoid paying for property bought at the sale of the estate.

Whatever right the defendant may have on the estate, against his co-heirs, he cannot avail himself of it to avoid paying for the property he bought at the sale of the estate. There may be debts of the deceased to pay, and the estate must be liquidated before any heir may claim any part of it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

*AILS vs. BOWMAN.*Eastern District,
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THE JUDGE OF THE SECOND PRESIDING.
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If A receive from B a slave at a stipulated price, to be paid for out of the proceeds of the sale of the slave of A, delivered to B at the same time, it is a contract of exchange, although the title be passed in the form of a sale.

Proof of a slave having ran away *once* does not constitute a *habit* of running away.

The plaintiff constituted one Nettles his agent, to sell or exchange a slave, who made a verbal contract with the defendant, by which the latter received the plaintiff's slave, and undertook to sell him to the best advantage. Nettles, at the same time, received from the defendant, a slave at the price of \$ 600, which was delivered to the plaintiff, and which was to be paid for out of the proceeds of the plaintiff's slave. On the 18th of February, 1829, the defendant executed to the plaintiff a bill of sale for the slave, which was received without any objection. The plaintiff's slave was subsequently sold by the defendant for \$ 640, twenty-five of which were paid over to the plaintiff. The slave received from the defendant, having ran away and died, this suit was brought to recover damages, which were laid at \$ 800, the alleged value of the slave delivered to Nettles.

The points raised by the plaintiff were: 1st, that the agent exceeded his authority—he was limited to *sell* or *exchange*, and did neither: 2d, the defendant had no authority to sell the plaintiff's slave: 3d, the plaintiff is not responsible for the slave of the defendant, and the measure of damages is the value of plaintiff's slave. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Turner and Johnson, for appellant.

Andrews, for appellee.

Martin, J., delivered the opinion of the court.

The plaintiff alleges he authorized Nettles to sell or exchange a slave of his—that Nettles made a verbal contract

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with the defendant, by which the latter agreed to sell the slave for the plaintiff, and account to him for the price ; and at the same time, delivered to the defendant, another slave for the price of six hundred dollars, to be paid out of the proceeds of the slave to be sold by the defendant, who did not execute any bill of sale for the slave delivered to Nettles, nor received any himself for the slave of the plaintiff.—That the defendant represented the slave, he delivered to Nettles, as a valuable one, while in fact, he was quite worthless, and given to the habit of running away.—That the plaintiff received the latter slave without any bill of sale therefore, and he soon after ran away, was frost bitten and died, although the plaintiff, after he arrested him, was at great expense to have him cured.—That the defendant had executed a bill of sale to Nettles for the slave, which the latter had no authority to receive, and which the plaintiff never accepted.—That the defendant has sold the plaintiff's slave, whereby he has been damaged, &c.

The allegations of the petition were denied, except the execution of the bill of sale by the defendant.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

At the trial the defendant's counsel asked Nettles, whether he was not authorized by the plaintiff, to receive the bill of sale for the slave delivered by him to the defendant. This was objected to, as not susceptible of being legally proven by oral evidence. The objection was overruled, and the plaintiff's counsel took his bill of exceptions.

The plaintiff proved his property in the slave he had delivered to Nettles.

Nettles deposed he delivered the plaintiff's slave to the defendant, and soon after, delivered to the plaintiff the slave he had received from the defendant. He took the slave of the plaintiff, at the latter's request, to be sold or exchanged. The defendant sold him for six hundred dollars, to be paid

out of the proceeds of the sale of the plaintiff's. The defendant did so to oblige the plaintiff, who was a friend of his; and if he had told the witness that the slave had ran away, on his way, it would have made no difference as to the trade. The defendant said his slave was a fine one, and would suit the plaintiff—but did not state his having ran away. The plaintiff was at first satisfied with the slave. The defendant paid the witness, twenty or twenty-five dollars for the balance between the sale of the plaintiff's slave and six hundred dollars. The witness credited the plaintiff therefore, and informed him of it in handing him the defendant's bill of sale. The plaintiff had previously requested the witness to procure the bill of sale and receive it, without making any objection, and made some observations, which the witness does not recollect.

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Another witness proved the defendant had mentioned his slave running away near the Homochita.

Evidence of this slave's running away from the plaintiff, of his being frost bitten, sickening, and dying, was given.

The appellant's slave sold for six hundred and forty dollars.

The appellant's counsel has urged that Nettles exceeded his authority, as he was directed to *sell* or *exchange* the slave, but did neither—that the appellee had no authority to sell that slave—that the appellant was not answerable for the appellee's slave—the appellant was, at all events, entitled to judgment for fifteen dollars, the difference between forty, the excess of the price of his slave and the twenty-five dollars received by Nettles.

It appears to us the jury did not err. There is written evidence in the plaintiff's petition, that he authorized Nettles to sell or exchange his slave. The contract which the latter made with the defendant, was one of exchange, for he received one slave for the other. Nettles did not engage that his principal should actually pay any money, in any

If A receives from B, a slave at a stipulated price, to be paid for out of the proceeds of the sale of the slave of A, delivered to B at the same time, it is a contract of exchange, although the title be passed in the form of a sale.

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event whatever—there was, therefore, no sale of the appellee's slave, who stipulated for no price to be paid him. For had the appellants slave been sold for less than \$600, the appellee would have had no claim.

The appellee received the appellant's slave for his, and undertook, on a certain event, to pay some boot. It is true, the transaction was finally concluded in the form of a sale, by the bill of sale given by the appellant to the appellee; but this was only a mode of passing the title.

We think the jury may well have allowed fifteen dollars, retained by the appellant, for the costs of the two bills of sale.

As to the bill of exceptions. What was the answer of the witness to the question objected to, 'does not appear in the bill of exceptions, or in the statement of facts. We must, therefore, believe, that no testimony was given thereon, or that it was deemed immaterial. In what way, however, the answer may have been, it does not appear that it could have had so much weight, as to justify us in remanding the case.

Proof of a slave having ran away once does not constitute a *habit* of running away.

There is only evidence of the slave having ran away once while in appellee's possession, and this does not constitute a *habit* of running away.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

GREEN vs. TURNER.

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT,
THE JUDGE THEREOF PRESIDING.

Where the case turns entirely upon a question of fact, the Supreme Court will not disturb the verdict of the jury.

Martin, J., delivered the opinion of the court.

The plaintiff seeks remuneration for personal services. The general issue was pleaded. There was a verdict and

judgment for the plaintiff, and the defendant, after an unsuccessful attempt to obtain a new trial, appealed.

The case turns entirely on the question of fact. No point of law appears to have been raised, and nothing authorizes us to disturb the verdict and judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

Eastern District.
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GREEN
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TURNER.

Where the case turns entirely upon a question of fact, the supreme court will not disturb the verdict of the jury.

SMITH vs. WILSON.

**APPEAL FROM THE COURT OF THE THIRD DISTRICT,
THE JUDGE THEREOF PRESIDING.**

Claims against an executor for the payment of the testator's debts, are exclusively cognizable before the Court of Probates, where the succession is opened.

The plaintiff was a partner of the defendant's testator, in a plantation and slaves, situate in the parish of West-Baton Rouge, wherein the deceased was domiciliated, and where his succession was opened. The defendant, a resident of the State of Mississippi, was appointed his executor, and, in concurrence with the plaintiff, caused the partnership property to be sold, under an order of the Court of Probates.

The petition set fourth, that the proceeds of the sale were not sufficient to pay the plaintiff's claim. That the defendant had administered upon, and received the whole of the testator's estate, in the State of Mississippi—was largely indebted thereto, and had property belonging to the succession, within the jurisdiction of the court, against which, and the property of the defendant, a writ of attachment was prayed and sued out. The defendant excepted to the jurisdiction of the court, which plea was sustained, and the plaintiff appealed.

Loddell, for appellant :

1. The exception of defendant was wrongfully sustained in dismissing the cause for want of jurisdiction.—*C. P. etc.*

Eastern District, 122, 126, 144, 334, 925, 983.—*Singletary vs. Singletary*,
 March 1881.

SMITH
 vs.

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March 7, N. S.

Downs, contra:

The District Court has no jurisdiction of a suit for money against a succession administered by an executor.—*C. P. art. 924, 983.*—*McDonough vs. Johnson's exor.*, 2 *Martin*, N. S. 287.—*Miles vs. Ford*, *Ibid*, 439.—*Tabor vs. Johnson et al.* 3 *Martin*, N. S. 674.—*Poyret vs. Vesser*, 8 *Martin* N. S. 595.

Mathews, J., delivered the opinion of the court.

This is a suit instituted by attachment against the executor of a succession, which was opened in East Baton Rouge. The will of the testator was there probated, and letters testamentary granted by the proper authority. The plaintiff had been in partnership with the deceased in a tract of land and some slaves, and concurred with the executor in having the whole of this property disposed of at probate sale. He now alleges, that the proceeds of that sale are not sufficient to pay the debts of the succession, and that it owes him five thousand dollars, &c.

The defendant, in answer to the petition, excepted to the jurisdiction of the District Court—this exception was sustained, and the plaintiff appealed.

Claims against
 an executor for
 the payment of
 the testator's debts
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 cognizable before
 the Court of Pro-
 bates where the
 succession is open-
 ed.

The suit does not appear to be personally against the defendant, but as executor, to obtain judgment decreeing the estate of his testator to be responsible for the claim of the plaintiff; for no *divestava* is alleged. The proceeding considered in this point of view was *coram non judice*, and the defendant's exception properly sustained.—*See Code of Practice, art. 924, no. 13 and 983.*—According to these articles, it is evident that this suit is exclusively cognizable before the Court of Probates, where the succession was opened. But a difficulty occurs, opposed to proceeding in the ordinary and legal way, in consequence of the executor

residing out of the jurisdiction of the State. It is, however, not for us to remedy this inconvenience. Perhaps the defendant might be destituted of his office, (as provided for in relation to tutor) and administration, granted to another fit person, with the will annexed.—Of this, however, we give no opinion.

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WILSON.

It is, therefore, ordered, &c. that the judgment of the District Court be affirmed with costs.

SMITH vs. WILSON.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,
THE JUDGE THEREOF RESIDING.

The Court of Probates has exclusive jurisdiction to decide on claims for money which are brought against successions administered by testamentary executors.

The parties, the cause of action, the pleadings, and the facts of this cause, are the same with the preceding one, except that the former suit commenced by attachment, and, in this, the defendant was held to bail; and that in this, the exception *pendentes lites*, was added to the defendant's plea to the jurisdiction. The court below sustained the exception and the plaintiff appealed.

Pierce, for appellant. *Downs*, for appellee.

Martin, J., delivered the opinion of the court.

The defendant sued for a debt of his testator, pleaded to the jurisdiction of the court, and averred he was suable in the Court of Probates only. His plea was sustained, and the plaintiff appealed.

The Court of Probates has exclusive jurisdiction to decide on claims for money which are brought against successions administered by testamentary executors

His counsel has referred us to the Code of Practice, 122, 126, 144, 334, 983, 925. We have vainly sought there, any thing in support of his case. The last article quoted, expressly recognises the exclusive jurisdiction of Courts of Probates, to decide on claims for money, which are brought

Eastern District, against successions administered by testamentary executors.
 March 1881.

N. 13.


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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

JOHNSON vs. BELL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
 THE JUDGE OF THE THIRD PRESIDING.

A promise to pay out of the proceeds of the next crop, is a time given for the discharge of an engagement, and not a condition on which the fulfillment of the obligation depends.

The facts are fully stated in the opinion of the court, delivered by

Porter, J.

The plaintiff, by his petition, alleges that the deceased brother of the defendant, owed him a sum of money, which the defendant unconditionally promised to pay.

The answer puts at issue this allegation.

The evidence shews, that the account of the plaintiff was put in the hands of an agent for collection. This agent made application to the original debtor, who informed him he would pay the debt, though he was under the impression there was some mistake about it. After his death, he applied to the defendant, who promised to pay the plaintiff out of the proceeds of the next crop. Failing to do so, the agent called on the defendant again, who then stated, that he had been compelled to pay more money for his brother than he anticipated: that his crop had fallen short, and that he could not pay. He further stated, that his brother was never fully satisfied of the correctness of the debt, and that he, the defendant, would pay it at his leisure.

The court below gave judgment in favour of the plaintiff. From which judgment the defendant appealed.

We think it should be confirmed here. There was no

condition annexed to the promise, as is contended. The defendant promised to pay out of the proceeds of the next crop. This was a time given for the discharge of the engagement, and not a condition on which the fulfillment of the obligation depended. Even if it were considered such, there is no evidence, the crop did not produce enough to pay the amount for which judgment is given below.

It is ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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March 1881.

JOHNSON
vs.
BELL.

A promise to pay out of the proceeds of the next crop, is a time given for the discharge of the engagement, and not a condition on which the fulfillment of the obligation depends.

ADAMS vs. DUPUY.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE THEREOF PRESIDING.

A continuance was properly refused, where the party was wanting in the exercise of legal diligence.

When the appeal is taken for delay, damages can only be awarded to the party in interest.

In May 1829, the plaintiff obtained an injunction and prayed that the sheriff, and plaintiff in execution, who resided in another parish, might be cited to answer the petition. Service was made upon the sheriff, who put in an answer, but no steps were taken to bring the original plaintiff into court.

The cause was called up for trial at April term, 1830, when the plaintiff moved for a continuance, on the ground that the plaintiff, in execution, had not been cited, and that the sheriff had no right to put the cause at issue. The court refused to continue, and no evidence being offered by the plaintiff, the injunction was dissolved, and the plaintiff appealed.

Morse, for appellant. *Morgan*, for appellee.

Porter, J., delivered the opinion of the court.

The defendant, who is sheriff of the parish of Iberville,

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was about carrying into effect an execution, which had been placed in his hands, against the plaintiff. He was stopped by an injunction obtained by the latter, who prayed that the plaintiff, in execution, living in another parish, and the defendant, should be cited, to answer the petition.

The injunction was obtained in May, 1829, and a copy with citation, was immediately served on the defendant, but no steps appear to have been taken, to bring the original plaintiff into court.

At the April term, in the year 1830, the cause came on for trial, on an answer filed by the defendant, when the plaintiff moved for a continuance, on the ground that the plaintiff, in execution, had not been cited, and that the sheriff had no right to put the cause at issue. The court rejected the application, and the plaintiff offering no evidence to sustain the allegation in his petition, the injunction was dissolved. From this judgment he has appealed.

A continuance was properly refused, where the party was wanting in the exercise of legal diligence.

The judge was clearly correct, in refusing the continuance on the ground laid. The plaintiff was totally wanting in the exercise of legal diligence. It was his duty, in the space of eleven months, to have the co-defendant, who lived in a neighbouring parish, cited. If obstacles were thrown in his way by the neglect or refusal of the officers of the court, to do their duty, application should have been made at the previous term, to quicken them in the discharge of it.

On the merits, there is no ground to doubt the correctness of the judgment below; and we cannot resist the impression, that the appeal was taken, as the appellee contends it was, for delay.

When the appeal is taken for delay, damages can only be awarded to the party in interest.

And we should accede to his prayer for damages, but that in the situation he is before the court, no damages has been sustained by him. He is not a party in interest. The person injured is the plaintiff in the execution, who was never cited.

We confine ourselves, therefore, to a simple confirmation of the judgment below, and it is ordered, adjudged and decreed, that it be affirmed with costs.

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ADAMS
vs.
DUPUY.

IRION vs. LOVE ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE OF THE THIRD PRESIDING.

In cases of conflicting testimony, the Supreme Court will place great reliance upon the conclusion of the court of the first instance.

This case turned entirely upon the testimony, which is fully stated in the opinion of the court delivered by

Porter, J.

This action is brought to recover from the defendants, the damages sustained by the plaintiff, in consequence of their having engaged to boil his crop of cane in the year 1829, and discharge the duties of sugar makers, on his plantation, that season.

The court below gave judgment against the defendants, for the sum of one thousand nine hundred and twenty dollars: they appealed.

There is only one question of law arising in the case. It relates to the correctness of the opinion of the court, in admitting a witness to be sworn for the defendants, who was objected to as incompetent, on the score of interest. The opinion we have formed on the merits, renders it unnecessary for us to say, whether the court erred.

The testimony on record, proves very fully, the plaintiff's case against the defendant, James Love, who gave his personal superintendence at the sugar house of the plaintiff. A large quantity of cane is shewn to have been lost, either through his ignorance or inattention. The correctness of the judgment, in relation to him, has not, indeed, been much questioned; but it is contended, there is no evidence which establishes, that William Love is at all responsible for the performance of his brother's contract.

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There is evidence to that effect, although it is contradicted, by proof introduced on the part of the defendant.

Newman swears, that a short time before the rolling of the cane commenced, William Love came to the house of the plaintiff, early in the morning, and observed to him, "that he should be able, with the assistance of his brother, James Love, to make his sugar *as agreed*. That if his brother was not fully capable of making good sugar, he would attend to it himself, and let his brother James attend to the boiling of Captain Hall's."

The witness further states, that the plaintiff afterwards called on Wm. Love, to come and make the sugar, as his brother did not make it well, and that William Love declined, in consequence of his engagement with Hall.

Another witness, whose name as written on the record, we cannot well ascertain, but which we understand to be *Shikemont*, swears that William Love told him, he had agreed to make the plaintiff's sugar at five hundred dollars, or furnish as good a sugar maker as himself.

On the part of the defendant, *Hall*, the witness whose testimony was objected to, on the ground of interest, swore, that he told William Love, in February 1829, that if he would return and make his sugar, he would guarantee to his brother, five hundred dollars for making a crop in the neighborhood: that he sent to the plaintiff, who came and made a verbal agreement to employ James Love. There was no mention of William Love being responsible for the undertaking of his brother; and he was to have nothing to do with the making of the sugar at the plaintiff's.

In corroboration of this witness, a written instrument, in the following words, and bearing the signature of the plaintiff, was introduced: "Be it known, that I have employed James Love, as sugar maker, from this time until the first of January next, for which services, I promise to pay him five hundred dollars. Oct. 1, 1829."

It is difficult, if not impossible, to reconcile this testimony, not even if we understand that James Love was employed on his brother's recommendation, and that the latter guaranteed his capacity and fidelity. We presume, however, the court below so understood it, when it rendered judgment against both. This view of the case is strengthened by the reflection, that James Love was a stranger, and that it is extremely improbable, any man of ordinary prudence, would engage another, of whose qualifications he was ignorant, for so important a trust, without assurances of his knowledge and integrity; or a guarantee which supplied the place of a recommendation that could be depended on.

This court has been in the habit, in cases of conflicting testimony, to place considerable reliance on the conclusion of the tribunal of the first instance, believing that the nearer the cause is tried to the parties, the greater is the probability of the truth being ascertained. We can see no reason to take this case out of the rule. There is not, by any means, such a preponderance in the proof, as would authorize us to reverse the judgment; and, we apprehend, justice has been done.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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In cases of conflicting testimony the supreme court will place great reliance on the conclusion of the court of the first instance.

LACOSTE vs. DE ARMAS

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE OF THE THIRD PRESIDING.

A party in interest may convey his legal title in a note to a third person, and by such conveyance, give that person a right to sue in his own name. In such a case, the defendant may offer every defence to the suit, by the agent, which he could present against the action of the principal. The agent can only be considered as the nominal plaintiff.

Suit by the indorsee, against the maker of a promissory note, who pleaded a want of consideration, and that the plaintiff had no interest in the note.

In support of the defence, interrogations were put to the

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plaintiff, who answered : that he was not the real owner of the note, but that it belonged to the trustees of the college of Bardstown, for whose interest, and by whose orders the suit was instituted. There was judgment for the plaintiff, and the defendant appealed.

Cuvillier, for appellant, made the following points :

1. An action can only be brought by one having a real and actual interest, which he pursues, but as soon as that interest arise, he may bring his action.—*C. P. art. 19.*

2. An action is the right given to every person to claim judicially what is due or belongs to him.—*C. P. art. 1st.*

Burke, for appellee.

Porter, J., delivered the opinion of the court.

This is an action by the endorsee of a promissory note against the maker. The defence is, that the note was given without consideration, and that the plaintiff is the agent of the payee. The court below gave judgment against the defendant, and he appealed.

There are two bills of exceptions on record, to the opinion of the court, refusing the defendant the right to make this defence, but as he was finally permitted to do so by a supplemental answer, and the cause comes up on its merits, we find it unnecessary to notice the opinions of the court to which these exceptions were taken.

The answer of the plaintiff to the interrogatories, admits that he is only agent for the payee, or rather for those persons for whose use the note was given to the payee ; and it is contended on the authority of the 15th article of the Code of Practice, that the action cannot be maintained in the form in which it is brought.

That article is in these words : " An action can only be brought by one, having a real and actual interest which he pursues, but as soon as that interest arise he may bring his action."

It appears to us, that there is nothing in the enactment which prevents the party in interest, from conveying his legal title to a third person, and by such conveyance, giving that person a right to sue in his own name. No consequence results from it affecting the right of the defendant, for he can offer every defence to the suit of the agent he could present against the action of the principal. The agent can only be considered as the nominal plaintiff.

On the merits. The proof fails to sustain the allegation of a want of consideration; and it is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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A party in interest may convey his legal title in a note to a third person, and by such conveyance give that person a right to sue in his own name. In such a case, the defendant may offer every defence to the suit, by the agent, which he could present against the action of the principal. The agent can only be considered as the nominal plaintiff.

FLUCKER vs. LACY.

APPEAL FROM THE COURT OF PROBATES FOR THE
PARISH OF ST. HELENA.

A party who bought his own property at a sale on a *fi fa*, and gave a twelve months' bond, has thus far executed the judgment as to debar himself from an action of nullity.

The plaintiff's property was seized to satisfy a judgment, which the defendant had obtained against him, and at the sale, the plaintiff became the purchaser. He afterwards brought an action of nullity to set aside the judgment. The court *a quo*, dismissed the action, and the plaintiff appealed.

Ripley, for appellant.

McCaleb, for appellee.

Porter, J., delivered the opinion of the court.

This is an action of nullity. Various grounds are set out in the petition. The judge of probates thought the action could not be maintained, because the plaintiff had purchased his own property, which was seized and exposed to sale, under an execution issuing in virtue of the judgment rendered against him.

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The 612 article of the Code of Practice, provides that the nullity of a judgment may be demanded at any time, unless the defendant were present in the parish, and suffered the judgment to be executed, without opposing the same.

In the instance before us, it makes a part of the allegations in the petition, that the plaintiff purchased at the sale made under the execution, issuing on the judgment now sought to be annulled, the property seized, and gave his bond at twelve months, for the price.

A party who bought his own property at a sale on a *fi fa*, and gave a twelve months' bond, has thus far executed the judgment as to deliver himself from an action of nullity

This was not only failing to oppose the execution of the judgment, but it was aiding to give it effect; and we do not think the judge below erred in deciding that the plaintiff could not maintain his action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

STATE vs. PITOT.

A stranger litigant in our courts, cannot have the benefit of their process and at the same time refuse obedience to their orders. So a curator, who has gone abroad, cannot obtain the aid of the court of probates for the delivery of the papers of the estate, while he refuses to comply with an order to account.

On the refusal of the judge of probates to deliver to Jackson's curator, the notes arising from the sale of certain slaves belonging to the succession, the latter applied for a *mandamus nisi*; in answer to which, and as grounds for his refusal, the judge alleged:

1. That the curator had been ordered to render an account of his administration, and had failed to do so:
2. That he resided out of the state: and
- 3d. That he had been charged by a mortgagee creditor, with mismanaging the affairs of the succession.

Porter, J., delivered the opinion of the court.

A *mandamus* is applied for, to compel the judge of pro-

bates, to direct the Register of Wills to deliver over to the curator of the estate, the notes and obligations which were received for the sale of the property belonging to it.

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To the rule requiring this to be done, or to shew cause for the refusal, the judge has assigned several reasons.

A mortgagee creditor of the succession, to a large amount, opposed the delivery in the court below ; alleging, that the curator resided out of the state—that he was mismanaging the affairs of the estate ; and that he had been ordered to render an account, and had failed to do so. The non residence, and the failure to obey the order, are admitted ; but the curator excuses his disobedience, by averring that he could not render an account until the credits due to the succession were delivered to him.

By the 1149 article of the Louisiana Code, sections three and four, the curator of a vacant succession, and of absent heirs, may be dismissed from his office, if he absents himself for a time from the state, without leaving a representative, and the succession sustains an injury thereby ; or if he is ordered to produce his account book, and he fails to do so.

The 1151 article of the same work, and the 1019 article of the Code of Practice, make it the duty of the judge of probates, to direct a suit to be instituted to procure the removal, when any fact comes to their knowledge which authorizes it.

The most regular course here, probably, would have been, to order such a proceeding to be instituted, and pending the controversy, to permit no change to be made in the situation of the affairs of the estate. It would be defeating the object of the law, which authorizes a removal for dangers real or apprehended, to place it in the power of the curator, while the action was going on, to inflict additional injury on the succession.

But that course has not been adopted. The court has merely refused to put the curator in possession of the credits

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of the estate, and the judge justifies the refusal, on the 1012 article of the Code of Practice, which declares, that if the curator refuses to render an account to those who have a right to demand it, he may be imprisoned—his property may be distrained ; or his compliance may be enforced, by any other means which the law affords.

A stranger litigant in our courts, cannot have the benefit of their process, and at the same time refuse obedience to their orders. So a curator, who has gone abroad, cannot obtain the aid of the Court of Probates for the delivery of the papers of the estate, while he refuses to comply with an order to account.

Notwithstanding the want of proceedings to remove the curator, we are of opinion the court below did not err. So long as he acted in contempt of its order, and by his residence in another state, placed it out of the power of the judge to enforce his decree, by the ordinary proceedings, we think he was authorized to refuse the curator the aid of the court. Granting the order, would have been assisting him to illegally administer the estate ; for his first duty was to obey the decree of the court which appointed him. A stranger, litigant in our courts, cannot have the benefit of their process, and at the same time refuse obedience to the orders made in the very suit in which he asks their assistance.

Let the rule be discharged.

SQUIRE ET AL. vs. BELDEN ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The community of acquits and gains, or legal partnership, is so inconsistent with the ordinary commercial partnership, that both cannot exist together, and the legal supersedes the commercial.

Whether a commercial partnership can exist between husband and wife, even when there is no community of acquits and gains. *Quere.*

In this suit the wife was included as a partner in the commercial firm existing between her husband and father. The court below dismissed the suit as to the wife, and gave judgment against the other defendants.

The plaintiffs appealed.

Pierce, for appellants.

Preston and Maybin, for appellees.

Eastern District.
March 1881.

Martin, J., delivered the opinion of the court.

SQUIRE ET AL.
vs.
BELDEN ET AL.

This is a suit against a husband, his wife, and her father, as members of a commercial firm, on a bill of exchange accepted by them. Judgment was given against the husband and father, but the suit was dismissed as to the wife; the court being of opinion, she was not bound by the acceptance, and the plaintiff appealed.

The appellants counsel has urged, that the partnership was proven, and the law allows it to exist between husband and wife.

The appellees counsel has denied both these propositions, and has prayed that the judgment may be so far amended as to render it final in her favor.

The marriage of the appellee took place in the year 1829, and it is not pretended that any matrimonial convention prevented the operation of that part of the law of this state, which establishes a community of acquits and gains between husband and wife—*C. C. 2312-69*. This community, or legal partnership, is so inconsistent with the ordinary commercial partnership, that both cannot exist together, and the legal supersedes the commercial.

The community of acquits and gains or legal partnership, is so inconsistent with the ordinary commercial partnership, that both cannot exist together, and the legal supersedes the commercial.

The husband is the head and member of the former. He administers its effects, and may dispose of all the personal property by gratuitous and particular title—*id. 2371*—the wife and her heirs, may exonerate themselves of the partnership debts—*id. 2379*—and can never be bound but for one half of them.

2371

In the commercial partnership, each member may bind or alienate the property of the partnership.—*Id. 2843-5*. Every partner is liable for all the damage which the partnership may sustain by his fault.—*Id. 2833*. The partners are bound in *solido* for the debts of the partnership.

Although the legal supersedes the commercial partnership,

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it cannot be superseded by it; for the legal, results from the tacit or express agreement of the parties, at the time of the marriage, and they cannot alter their matrimonial agreements after the celebration of the marriage.—*Id.* 2309.

The appellants counsel has cited a case from 4th *Sirey*, of a commercial partnership between husband and wife. In their contract of marriage, this circumstance prevented the operation of the law in creating a community. It was a matrimonial convention that it should not exist.

Whether a commercial partnership can exist between husband and wife, even where there is no community of acquits and gains. Quere.

Perhaps a commercial partnership cannot, in this country, exist between husband and wife, even where there is no community of acquits and gains.

A wife, whether in community of goods with her husband or not, cannot bind herself *jointly* with him for any debt of his.—*C. C.* 241. It is otherwise in France; for there she may bind herself jointly or severally with him, for his own or the community's affairs.—*Code Napoleon* 1331—*Brandegee and wife*, 7 *Martin N. S.* 64-7—*Dumford vs. Gross and wife*, 7 *Martin* 466.

The district court, in our opinion, did not err in declaring the wife was not bound.

The appellee has prayed, that the judgment which dismisses her, and is *quasi* a nonsuit, be amended, and that she may have an absolute judgment in her favor. We think she has a right thereto.

It therefore ordered, adjudged, and decreed, that the judgment of the District Court, as far as relates to the wife, be annulled, avoided, and reversed, and that there be judgment in her favor, with costs.

PATOUILLET vs. PATOUILLET.

APPEAL FROM THE COURT OF PROBATES FOR THE
PARISH AND CITY OF NEW-ORLEANS.

On the division of a parish the former Court of Probates retains its jurisdiction of successions theretofore opened.

This suit was brought by the son, to recover from his

mother and natural tutrix, the share accruing to him from the succession of his father, which was opened in the parish of Orleans.

Eastern District,
March 1881.

PATOUILLET
vs.
PATOUILLET.

The defendant excepted to the jurisdiction of the court, on the ground that she was a resident of the parish of Jefferson. The court overruled the exception. There was judgment for the plaintiff, and the defendant appealed.

Preston, for appellant. *Rousseau*, for appellee.

Mathews, J., delivered the opinion of the court.

In this case the plaintiff claims from his mother, the portion of his father's estate which fell to his share, and was administered by her, as his tutrix by nature, and he obtained judgment in the court below, from which she appealed.

An objection was made to the jurisdiction of the Probate Court of the parish and city of New-Orleans, on account of an alleged division of the parish, which placed the defendant in the parish of Jefferson. It does not appear that on the division, any requisition was made by law, for the removal of records to the new parish. The court in which this suit was commenced, is that in which the succession of the plaintiff's father was opened. Under all the circumstances of the case, we are of opinion that the judge *a quo*, was right in retaining jurisdiction.

On the division of a parish the former court of probates retains its jurisdiction of successions thereto opened.

The defence set up on the merits of the cause, is expenditures incurred by the tutrix, beyond the revenue of the minor. The evidence does not establish the facts of this defence.

It is therefore ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

24 271
44 416

ST. DEZIER vs. MICHAUD.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE THEREOF PRESIDING.

If the plaintiff does not entitle himself to a privilege by proper averments on the record, it cannot be allowed to him.

Eastern District,
March 1881.

ST. DEZIER
vs.
MICHAUD.

Mathews, J., delivered the opinion of the court.

This suit is brought by an undertaker on a contract to build a house. His claim is resisted, by the defendant, on the ground of failure, on the part of the builder, to do the work as stipulated in the contract. The petition contains a count for a *quantum meruit*, on which the court below rendered judgment in favor of the plaintiff, for four hundred and twenty-four dollars and twenty-five cents. The defendant appealed.

The correctness of this judgment, depends mainly on the evidence of the cause. We have examined it carefully, and believe the conclusions of the judge *a quo* on it, to be just.

If the plaintiff does not entitle himself to a privilege by proper averments on the record, it cannot be allowed to him

Since the appeal, the plaintiff and appellee, has prayed the judgment of the District Court to be amended, by decreeing to him a privilege on the building, &c. The record, however, shows nothing which entitles him to the privilege claimed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs in both courts.

KEMP vs. WAMACK ET AL.

**APPEAL FROM THE COURT OF PROBATES OF THE PARISH
OF ST. HELENA,**

Testimony should be weighed by probabilities, and its truth be rather ascertained in this manner, than by counting the witnesses.

The facts are stated in the opinion of the court delivered by

Mathews, J.

This suit was instituted in the court below, by the natural tutrix of her daughter, against the latter, the wife of the defendant, having for its object the liquidation and payment of certain disbursements and expenses, which the plaintiff alleges she made and incurred, in her capacity as tutrix of

her minor child, who was heir to her father. The judge of Eastern District, March 1831. probates gave judgment against the defendants, for one thousand and sixty dollars, from which they appealed.

A just decision of the case depends, principally, on matters of fact. There is but one question of law, and that arises out of an article of our old Civil Code, which prohibits tutors or curators from expending, in the support and education of minors, more than the revenue of their estates.—*See O. .C p. 70, art. 60.* But this question, according to the conclusion to which we have arrived on the facts of the case, need not be discussed.

The whole amount of charges against the defendants, according to the account exhibited by the tutrix, is two thousand two hundred and fifty-four dollars. The principal items of which this sum is composed, are for boarding, clothing, and educating the minor, and the cost of raising a number of young slaves, the property of the latter. The first of these items is six hundred and fifty dollars; and the whole of the second charge amounts to one thousand four hundred and seventy dollars. These charges, we are of opinion should, in pursuance of probability resulting from the testimony of the case, be reduced one half. As to the first, the answer to interrogatories put to the defendants, corroborated by one witness; shews, that the services of the minor in the household establishment of her mother was, for more than six years of the period of thirteen during which time board is charged against her, an equivalent for the expense of boarding.

The large item, of one thousand four hundred and seventy dollars, is an aggregate of charges for supporting young negroes, previous to an age at which they may be considered as useful; and they are made at the rate of thirty dollars per year on each head. This we think unreasonable. It is true, that a majority of the witnesses introduced on this subject, thought otherwise; and the judge *a quo* seems, by count-

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KEMP
vs.
WAMACK ET AL.

Testimony should be weighed by probabilities, and its truth be rather ascertained in this manner, than by counting the witnesses.

ing them, to have acquiesced in the opinion of that majority. Numeration is certainly the easiest mode by which judges can arrive at conclusions on matters of fact, supported alone by the testimony of witnesses ; but the law of evidence requires that their testimony should be weighed by probabilities, and its truth be rather ascertained in this manner, than by counting numbers.

The defendants, by their answers to interrogatories, estimate the costs of raising young slaves, up to the time at which they become useful to owners, at ten dollars per annum. One of the witnesses thought that fifteen dollars would suffice to cover all necessary expenses ; and to his opinion, we are disposed to give the greatest weight in the present case, as the negroes in question were nurtured on a plantation, and required, in this climate, little clothing; and were probably fed on bread and other cheap articles of clothing. We, therefore, conclude, according to the premises above stated, that the just charge, in favor of the plaintiff, for these two items, ought not to exceed one thousand and sixty dollars ; to which must be added, one hundred and six dollars, paid for taxes on the defendants property ; making together, one thousand one hundred and sixty-six dollars. In the account, as stated by the tutrix, the minor seems to be entitled to one thousand one hundred and twenty dollars credit ; and this, without taking into consideration the interest which she had a right, by law,¹ to claim on a capital of five hundred and ninety-two dollars, allotted to her on a partial partition of her father's estate.

From the whole evidence of the case, we are of opinion, that the plaintiff ought not to recover any thing.

It is, therefore, ordered, &c. that the judgment of the Court of Probates be avoided, reversed and annulled, and that judgment be here entered for the defendants, with costs in both courts.

SAMPLE ET AL. vs LAMB'S CURATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH
OF WEST FELICIANA.

Eastern District,
March 1881

*SAMPLE ET AL.
vs.
LAMB'S CURA-
TOR.*

A joint authority cannot be exercised by a part of those to whom it is delegated, even after the death of one of them.

A number of individuals subscribed a sum of money for the construction of a road, and appointed five commissioners to contract for the work.

They employed Lamb, and transferred to him the subscription paper. Lamb collected from the subscribers large sums, and died before the completion of the work.

The petition stated that one of the commissioners was dead, and this action was brought by the surviving four, to recover damages from the curator of Lamb.


The defendant excepted to the plaintiff's right of action, on the ground that the power was delegated to five commissioners, and one of them was not a party to the suit, but was alleged to be dead. The exception was overruled—there was a judgment from which the plaintiffs appealed, but the reversal of which was prayed for by *Turner*, for the appellees, who made the following point:

1. There was no authority vested in the plaintiffs to commence and carry on this action, and the court below erred in overruling the exception.—*C.C. arts. 2964, 2965, 2966.*

Martin, J., delivered the opinion of the court.

The plaintiffs state that a number of individuals subscribed a considerable sum of money, for the construction of a road from the town of St. Francisville to the Mississippi, and appointed them and one Smith, who has since died, their commissioners, to carry their intention into execution; and they accordingly contracted with Lamb, who took on himself to perfect the road, and to enable him to do so, they transferred the subscription paper to him: that he made large collections, but did not comply with his engagements, and has since died; and the defendant is curator of his

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March 1881.


SAMPLE & AL.
vs.
LAMR'S CURA-
TOR.

estate. The petition concludes with a prayer that the defendant be decreed to retransfer the subscription paper to the plaintiffs—that they may be declared privilege creditors for the value of certain slaves purchased by Lamb out of the moneys collected by him from the subscribers: that damages be allowed them, &c.

The defendant pleaded several matters as exceptions to the plaintiff's right to maintain their suit; but particularly that they allege that authority was given to them and another, to act as commissioners or agents for the subscribers; and that the authority being *joint* only, and not joint and several, can only be exercised by the five persons to whom it was granted, and not by a less number, even after the death of one of the five.

The exceptions were overruled—the defendant answered over: there was a judgment, from which the plaintiffs appealed; but the reversal of which is prayed by the defendants and appellees, who contend that their exceptions were erroneously overruled.

A joint authority cannot be exercised by a part of those to whom it is delegated, even after the death of one of them.

The authority given by the subscribers to the five individuals, whom they appointed as their commissioners, was a joint one only: it was not joint and several, and cannot be exercised by a less number than the whole: not by the survivors of either of them.

Pothier states that when several persons are authorized to do an act jointly, the death of either, puts an end to the authority.—*Mandat*, 102. In another part of the same work, he examines whether when two are authorized to do an act, either of them exceeds his authority in doing it alone; and he adds, that if from the smallness of the object, it is presumed the mandatories were expected to act severally, the authority has not been exceeded. He makes it a question of fact on a point of evidence.

If this afforded us a legitimate rule, the presumption would be, that the authority was not joint and

whether a less number than all could act, and what number was intended, would not be easy to be determined.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, and the petition dismissed with costs in both courts.

Eastern District,
March 1831.

SAMPLE ET AL.
vs.
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TOR.

ROTHSCHILD ET AL vs. RAMSAY.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A sheriff or marshal is no further the agent of a plaintiff in execution, than that which is derived from the writ placed in his hands. The instant it is returned into court, or the return day expires, the authority of the officer to enforce the judgment, or receive the money in discharge of it, also expires, unless he has previously made a levy, in which case the law permits him to sell the goods seized.

The plaintiff's testator, with the defendant, and eight others, became the sureties of one Gibbes, for the faithful performance of his duties as paymaster to the 1st Regiment of Infantry of the United States' army. Gibbes being in arrears to the government, suit was instituted against him and his sureties, upon their bond; and judgment obtained, which was wholly satisfied out of the estate of the plaintiff's testator.

The petition charged, that by this payment, the plaintiffs became subrogated to the rights and privileges of the United States. That four only of the co-sureties were solvent and able to pay; that each of those were liable; and that the respective share of each amounted to the sum of \$2000, exclusive of interest and costs; for which judgment was prayed against the defendant, who pleaded the general issue.

It appeared that the judgment against Gibbes and his sureties, was rendered on the 7th of April, 1820. Execution issued on the 5th of October, 1826, and on the 10th of December of the same year, the marshal made upon it the

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following return: "Received 5th October, 1826, served upon W. W. Montgomery, one of the executors of the late R. L. Rochelle, one of the sureties, on the same day. Stayed afterwards by agreement of J. W. Smith, U. S. dist. atty."—(Signed) John Nicholson, U. S. Marshal."

On the 14th of April, 1830, the following entry was made on the execution docket, which was introduced by the plaintiffs, to sustain the allegation of payment:

"*The United States vs. William Gibbes et al.*—1269.—Amount of judgment \$10,000, 6 per cent. interest, from the 2d of January, 1819.

"*The United States vs. William Gibbes et al.*—1270.—Amount of Judgment \$10,000, 6 per cent. interest from the 2d of January, 1819.

"In these two cases—Nos. 1269 and 1270—there was made, from the estate of R. L. Rochelle, one of the securities, the sum of \$14913 13 cents. for principal interest and cost, which cost amount to the sum of \$372 49 cents; the same was made in the years 1826 and 1827. (Signed) JOHN NICHOLSON, *United States' Marshal.*"

A bill of exceptions was taken to the opinion of the court below, permitting the plaintiffs to prove, by parol, the insolvency of the co-sureties of the bond. On the merits, the court *a quo* was of opinion, that the plaintiffs were entitled to recover a *viril* proportion, and gave judgment accordingly. The defendant appealed.

Grymes and *Maybin*, for appellant.

Carleton and *Lockett*, for appellees.

Porter, J., delivered the opinion of the court.

The ancestor of the plaintiffs, the defendant and several others, became sureties of one Gibbes, who was appointed paymaster to the First Regiment of Infantry in the army of the United States. Suit was brought on this bond, and judgment rendered against the principal, and sureties.—

This action is brought to recover from the defendant his share of the money, which the plaintiffs allege was made out of the estate of their ancestor, in satisfaction of the judgment.

Eastern District,
March 1881

ROTHSCHILD ET
AL VS
RAMSAY.

Various grounds of defence have been presented; but the opinion we have formed on one of them, renders an examination of the others unnecessary.

The judgment already alluded to, was signed on the 7th of April, 1820. On the 5th of October, 1826, a writ of *fiery facias* issued against all the defendants, and, on the same day, came into the hands of the marshal. The 10th of December of the same year, it was returned into court, with the following endorsement: "Received, 5th October, 1826. Served on W. W. Montgomery, same day, as one of the executors of the late R. L. Rochelle, one of the sureties. Stayed by agreement of the Attorney General J. W. Smith. Returned 10th December, 1826. (Signed) JOHN NICHOLSON, *United States' Marshal.*"

To sustain the allegation of payment, the plaintiffs introduced the following document:

"*The United States vs. W. Gibbes et al.*—1269.—Amount of judgment, \$ 10,000, 6 per cent. interest, from the 2d of January, 1829.

"*The United States vs. W. Gibbes et al.*—1270.—Amount of judgment, \$ 10,000, 6 per cent. interest, from 2d of January, 1819.

In these two cases—Nos. 1269 and 1270—there was made from the estate of R. L. Rochelle, one of the securities, the sum of \$ 14913 13 cents, for principal, interest and costs; which costs amount to the sum of \$ 372 49 cents: the same was made in the years 1826 and 1827.—(Signed) JOHN NICHOLSON, *U. S. M.*—*New-Orleans, April 14, 1830.*"

As it appears from the certificate of the marshal, on the writ of execution, that nothing had been done on it at the time it was returned into Court, except serving it on the

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A sheriff or marshal is no further the agent of the plaintiff in execution, than the writ placed in his hands. The instant it is returned into court or the return day expires, the authority of the officer to enforce the judgment, or receive the money in discharge of it, also expires, unless he has previously made a levy, in which case the law permits him to sell the goods seized.

ancestor of the plaintiffs, the question presented for our decision is, whether a payment made to that officer, under the circumstances already stated, is such a payment to the United States, as binds them, and discharges the judgment ?

We have looked into the Statutes of the United States, to see whether they conferred power on the marshals to receive money on behalf of the government, except in cases where writs of execution are placed in their hands, and we are unable to find any provision which vests there with authority to do so. In all the enactments, relating to them, their pecuniary responsibility is contemplated to arise from the execution of process intrusted to them.

On general principles, a sheriff, or marshal, is no further the agent of a plaintiff in execution, than that which he derives from the writ placed in his hands. He represents the party for no other purpose. And the instant it is returned into court, or the return day expires, the authority of the officer to enforce the judgment, or receive the money in discharge of it, also expires, unless he has previously made a levy ; in which case, the law permits him to sell the goods he has seized. In the instance before us, the marshal received the money after the return of the writ into court, and subsequent to the day on which it was returnable ; and it does not appear he had made any levy on it, while it was in his possession.

It is not shewn the United States has sanctioned this act of their officer, nor that the usual proceedings have followed the receipt of the money, from which their ratification of it can be presumed.

An act of Congress requires the marshal to make a return to the agent of the treasury, within thirty days from the commencement of the several terms of the courts of the United States, of the proceedings which have taken place upon all writs of execution, or other process placed in their hands, where the United States is a party. Another act re-

quires, that all moneys received by the officers of the court, shall be immediately deposited in the Branch Bank to the credit of the court. These steps may have been taken here, but we can only judge of what exists, from what appears. From the evidence adduced in this case, the money was made in 1826-7, and no return is made in court, by the marshal, until 1830.—*Ingersol's Digest*, ed. 1825, 127-566.

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ROTHSCHILD ET
AL. vs
RAMSAY.

As the plaintiff's, therefore, have not shewn they paid to a person authorized to receive the money on behalf of the government of the United States, they have not established a right of action against the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered and decreed, that there be judgment against the plaintiffs, as in case of nonsuit, with costs in both courts.

ROTHSCHILD ET AL. vs. BOWERS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT. Same vs. Bowers. —

This case presents the same point with that of the same plaintiff vs. Ramsay, and must receive the same decision.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided and reversed. And, it is further ordered, adjudged, and decreed, that there be judgment for the defendant as in case of nonsuit, with costs in both courts.

ROTHSCHILD ET AL. vs. COX.

Same vs. Cox.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

This case is in all respects similar to that just decided between the same plaintiffs and that of Ramsay, and must receive a similar decision.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided, and re-

Eastern District, versed. And it is further ordered, adjudged and decreed,
 March 1881. that there be judgment for the defendant as in case of non-
 ROTHSCHILD ET suit, with costs in both courts.
 AL. vs. COX.

MEAD ET AL. vs. BUCKNER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The master of a steamboat, who contracts for repairs, is personally bound. The parties contracting with him have a double remedy: they may sue him, or sue the owners on a contract made with their agent.

Where the evidence is contradictory, but preponderates in favor of the party for whom the jury find, the supreme court will not interfere with their verdict.

It is not necessary to file an answer to a plea in reconvention.

The principle that reconvention on reconvention cannot be permitted was firmly settled by our ancient laws, and the Code of Practice neither contemplates nor provides for such a mode of proceeding. But the party must object to its being filed at the time it is offered.

The circumstance of the jury finding three hundred dollars damages, when only two hundred were claimed, furnishes no ground for setting aside their verdict—and for the excess, the attorney had a right to enter a *remittitur*.

The facts are fully stated in the opinion of the court, delivered by

Porter, J.

This action was instituted on an unliquidated demand, for work and labour done. The defendant was arrested and held to bail. He denied all the allegations in the petition, except that he was part owner of the steamboat on which the plaintiffs had worked. And he further set up a demand in reconvention, for damages sustained by the plaintiffs, not having executed the repairs on the boat, within the time stipulated in the contract, and for having made them in so unskilful and defective a manner, that great injury was sustained by himself and the other proprietors of the steamboat. To this demand, in reconvention, the defendant annexed an affidavit of the truth of the facts therein set

fourth, and one of the plaintiffs, Mead, was arrested and held to bail.

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To the petition in reconvention, the plaintiff pleaded the general issue. And, in addition to the defence, claimed two hundred dollars damages, in reconvention, for the illegal and malicious arrest of one of the plaintiffs, on the defendants demand in reconvention. To this last demand no answer was put in.

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The jury, however, took all the matters into consideration, and found for the plaintiffs, on their original demand, against the defendant, on his demand in reconvention—and in favour of the plaintiffs, on their reconventional demand. The damages assessed by them on the last ground, being one hundred dollars more than the plaintiffs claimed. Their counsel entered a *remittitur* for that sum, and the court confirmed the verdict, after overruling a motion of defendant for a new trial.

He has appealed, and alleges as error :

1. The judgment is for a larger amount than that set fourth in the account, annexed to and making part of the petition—8, N. S. 386.

2. The answer shews that there are several owners of the steamboat Walk-in-the-Water, and the judgment is against the defendant only.

3. The evidence shews that the claims of the defendant as plaintiff, in reconvention, though well supported, were overlooked by the jury.

4. There was no *contestatio litis* on the plaintiff's supplemental claim for damages.—8, N. S. 297, 301 and 338.

5. The verdict of the jury, on the claim of the plaintiffs for damages, shews that vindictive damages were awarded.

6. The attorney of the plaintiff had no authority to enter a *remittitur* for the excess over the demand of the plaintiff.—4, N. S. 145.

1. The sum claimed in the original petition, is \$613 37

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The master of a steamboat who contracts for repairs is personally bound. The parties contracting with him have a double remedy—they may sue him, or sue the owners on a contract made with their agent.

Where the evidence is contradictory, but preponderates in favor of the party for whom the jury find, the supreme court will not interfere with their verdict.

It is not necessary to file an answer to a plea in reconvention.

The principle that reconvention on reconvention cannot be permitted, was firmly settled by our an-

cents. The judgment of the court is for \$613 29 cents. The excess of two cents has properly not been noticed. The objection on the argument was, that by the account filed with the petition and made a part thereof, it does not appear that \$613 27 cents is due. The only account we see on the record is for a larger sum than that claimed. Whether it is that which was filed with the petition, we have no means of knowing.

II. The second ground on which a reversal of the judgment is claimed, is wholly untenable. The contract for repairs, in this instance, was made with the master of the boat; and, it is a well understood and familiar doctrine of commercial law, that in such cases the master is personally bound. The parties contracting with him have a double remedy. They may sue him, or sue the owners, on a contract made with their agent.

III. The next ground calls from us an opinion on the merits. We have examined the evidence. It is contradictory, but we think preponderates in favour of the plaintiffs. It is far from presenting a case which would authorize us to interfere with the verdict of the jury.

IV. The next error alleged is the want of a *contestatio litis*, on the plaintiff's supplemental claim for damages.

We have decided in the case of *Suarez vs. Duralde*—1, *Miller* 266—that it is not necessary to file an answer to a petition in reconvention. The law implies a general denial to such demands. We, therefore, think there was a *contestatio litis*, and the cause cannot be remanded on that ground. The difficulty we have had with this part of the case, does not arise from want of an answer to the claim in reconvention, but from permitting such a claim to be filed. If it had been objected to, it must have been rejected. The principle that reconvention cannot be permitted on reconvention, was firmly settled in our ancient laws, and the Code of Practice neither contemplates nor provides for such a mode of pro-

ceeding. It would produce utter and inextricable confusion in the trial of causes. In the case of *Parker vs. Starkweather*, we held that to a petition of reconvention, the plaintiff might plead matters in compensation, which would shew the claim of defendant to be extinguished ; but that he could go no farther. The present demand was not of that character. It was not offered in compensation of the defendant's claim in reconvention, and it was for matters which could not be pleaded in compensation.—6, *Mart.* 610.

But the case does not present the naked question as to the legality of permitting such a claim ; it embraces another very important consideration, whether the defendant can now take advantage of the irregularity. He did not object to the petition being filed. He made no opposition to the matters embraced by it being submitted to the jury ; or, at least, if he did, the record contains no proof of it. We think, therefore, that after acquiescing in an examination of the demand, in the form in which it was presented, and taking the chance of having it rejected by the jury, he cannot have the case remanded, because they found against him.

V. The jury are charged with rendering *vindictive* damages. The proof offered of it is, that they found \$300 for the malicious arrest, when only \$200 were demanded. But we see no evidence of such a feeling in this circumstance. They, no doubt, thought the plaintiffs entitled to the sum they found due to them, and supposed they had demanded it. It cannot be presumed, that twelve men called on their oaths, to decide between two strangers, should be seized with a spirit of revenge against one of the parties, and in furtherance of it, give vindictive damages. There are many other ways of accounting for the error, and this is the last which should be resorted to. Excess of this description, is not an uncommon occurrence ; but it is rare to consider the whole finding as bad, because such a

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cient laws, and the Code of Practice neither contemplates nor provides for such a mode of proceeding ;—but the party must object to its being filed at the time it is offered.

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The circumstance of the jury finding 800 dolls. damages when only \$200 were claimed, furnishes no ground for setting aside the verdict; and for the excess the attorney had a right to enter a *remititur*.

mistake is made. If the jury thought (and we are not prepared to say there was error in their so thinking,) that the claim of \$3000 damages was exaggerated, and that the defendant, profiting by his position, had attempted to impede and embarrass a stranger among us in pursuit of justice, then, perhaps, the error was not in the jury giving too much; but in the plaintiffs asking too little. At all events, it furnishes no ground for setting the verdict aside.

The last ground, is the want of authority in the attorney to enter up the *remititur*. As judgment could not have been obtained for the excess, and as that excess stood in the way of judgment, for what was really due, we think the attorney acquired a right for his client, instead of surrendering one. It was within the scope of his authority to do all matters in court necessary to obtaining the sum which his client had demanded in the petition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

SAME CASE ON A REHEARING.

Porter, J., delivered the opinion of court.

The defendant has moved for and obtained a rehearing. Acquiescing in every other part of the judgment, except that which rejected his claim to a diminution of the *amount* in which he was condemned, he contends there was error in not sustaining that objection.

The sum claimed in the petition is \$613 27, according to the account annexed, and made a part of the petition. That account, as added up by the plaintiff, corresponds with the allegation just stated. But it is shewn that by running up the addition of the figures, there is an error of one hundred and eighty-eight dollars. This difference the plaintiffs have endeavoured to explain, but have failed to do it satisfactorily to our minds.

The original account produced on this argument, does

away the difficulty we had in sustaining the objection, when the cause was first heard. The judgment, therefore, must be amended so as to meet the facts of the case.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the plaintiffs do recover of the defendant the sum of five hundred and twenty-five dollars and 31 cents, with costs in the court below, those of appeal to be borne by the appellee.

BEAUVAIS vs. MORGAN.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE OF THE THIRD PRESIDING.

The syndic of an insolvent cannot maintain an action after the filing and homologation of the tableau of distribution.

The defendant excepted to the plaintiff's right to sue as syndic of an insolvent, on the ground, that previous to the institution of the suit, he had filed a tableau of distribution, which had been homologated. The court sustained the exception, and the plaintiff appealed.

Cooley, for appellant.

By the thirtieth section of an act of 20th February, 1817, relative to the surrender of property—*Moreau's Dig. vol. 2, p. 432*—it is provided, that it shall be the duty of syndics, without any authorization from any court for that purpose, to sue and be sued as plaintiffs or defendants, in every thing which respects the rights and actions which may belong to the insolvent debtor, and which may concern the mass of creditors; and finally, they shall make a distribution of the proceeds of said property agreeably to the directions of the court. And the 35th section of the same act, prescribes the manner in which the tableau shall be made: That the syndics shall file it in the clerk's office—That notice shall be given to the creditors, to shew cause why the said statement should not be homologated, and the distribution made

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agreeably to its contents. Now we find by the 30th section cited, that it is the duty of the *syndic*, not the creditors, nor the person who may have filled the office of syndic, to make a distribution agreeably to the directions of the court—that is, according to the tableau of distribution provided for in the 30th section, and duly homologated by the court.

If, then, it is the duty of the *syndic*, to make a distribution after the homologation of the tableau, how could he discharge that duty had his functions ceased, *ipso facto*, by the homologation of the tableau? The distribution could not be made before the homologation; and if he is *functus officio* by that fact, it must be made by some other than the *syndic*, upon whom the law has unequivocally imposed the duty.

As further proof that it is the duty of the syndic to make the distribution, we have the first section of an act of March 29th, 1826—*Moreau's Dig. vol. ii., p. 437*—which provides: “That if after all the creditors shall have been paid out of the property ceded as aforesaid, there remains a balance in the hands of the *syndics*, the said debtor shall be entitled to recover and receive, from the said *syndics*, the said balance.” This then is conclusive proof that the syndic can be sued, not only after the homologation of the tableau, but after the distribution among the creditors. If he can be sued in the capacity of *syndic*, he must necessarily fill that office; and it follows, as a *corollary*, that he can sue in the same capacity.

Ogden, for appellee.

The court has decided, that “the homologation of a tableau of repartition, put an end to the legal functions of syndics.—*Bernard vs. Vignaud*, 1 *Martin*, N. S. p. 10.

2. The rule of the *Novissima Recopilacion*, that if after a right is alleged in one capacity, and proved in another, judgment may be given according to the justice of the case, cannot apply here; because that rule presumed a waiver by

the defendant, of the principle, that the allegations and proof must correspond ; and it can scarcely be presumed in this instance, that the party making this objection would, on the trial of the cause, consent to the introduction of proof which would destroy its force.—*Rodriguez vs. Morse*, 2 Mart. N. S. p. 358.

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Porter, J., delivered the opinion of the court.

The plaintiff sues as syndic of the estate of one Lude-ling. An exception was taken, and sustained in the court of the first instance : that the syndic could not maintain this action, because, previous to its institution, he had filed a tableau of distribution, which had been homologated.

The court has so decided in two cases. The authority of the syndic was intended to cease some time ; and as the law has not expressly declared when it shall terminate, we think it should with the rendition of the tableau of distribution, and the judgment of the court approving it. Cases might, perhaps occur, where special circumstances would require a repartition of the funds in the hands of the syndics, and where, at the same time, it would be the interest of the estate they should be continued in the administration. But it is doubtful whether the law sanctions such a proceeding, without a meeting of the creditors ; and, at all events, it is an exception to the general rule, and the syndic, who claims to act as such subsequent to the homologation of the tableau of repartition, should shew something more than his original appointment, to enable him to represent the estate. It is urged, that this opinion is inconsistent with the facts in every case ; because after the tableau is filed and approved, the syndic has to pay over the funds in his hands, to the creditors, and may be sued as such, to compel him to do so. Admitting this to be true, it does not follow, because he has incurred responsibility in his representative character, that he continues to be representative. An executor, or curator,

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may be sued after his term of office expires, though he can no longer bring suits, collect debts, and administer the estate. If a balance remains in the syndics hands, after paying all the creditors, he is personally responsible to the ceding debtor, and not as syndic or agent of the creditors.—3 *Martin*, 589. 4 *N. S.* 10.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

McMICKEN vs. BEAUCHAMP.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,
THE JUDGE OF THE SECOND PRESIDING.

Erasures or interlineations in the substantial part of an instrument, are presumed to be false or forged, and must be satisfactorily accounted for before the instrument can be received in evidence.

The facts are fully stated in the opinion of the court delivered by

Mathews, J.

This suit is brought against the acceptor of a bill of exchange. The acceptance by the defendant is conditional, and was made in the following words: "I accept the above order, etc. upon the express understanding, that no part is liable to be paid, until a certain judgment for one thousand dollars, in favor of the estate of C. Gale, rendered against John Leggo and Samuel Adams be satisfied, if the same should be a lien on the land bought: believing the same may be a lien upon the land upon which I live at present, and which was conveyed to me by Samuel Adams, subsequent to the said judgment being recorded. May 10, 1820."

The answer, among other pleas, contains a general denial.

On the trial of the cause in the court below, the reading of the acceptance was objected to by the defendant's counsel, until the plaintiff should account for the words, "if the same be a lien upon the land bought," being interlined in

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said instrument; as they appear to have been written with ink different in color from the other parts of it.

The judge *a quo* overruled this objection; and judgment being rendered in favor of the plaintiff, the defendant appealed.

We are of opinion the judge erred in receiving the instrument in evidence, with this apparent falsification—if the alteration be in a substantial part—*See Febrero, part. ii. b. 3, c. 1, no. 341*—wherein the author treats of the falsity of instruments which may be presumed. On examining the authority to which he refers in relation to this subject, we discover, that writings erased or interlined, are presumed to be false. Mascardus de probationibus in concl. 126 states, positively, that writing erased, is presumed to be false or forged, No. 1. No. 2. *Scriptura in qua abrasio reperitur, nihil perversus probat.*—No. 8. The same rule prevails in relation to interlineations. This rule has its exceptions or limitations: the first of which is, that it is not applicable to instruments where the erasure or interlineation is not made in a substantial part. The interlineation found in the acceptance on which the present action is based, appears to us to have been made in such a manner as to change the obligation of the acceptor, by introducing an alternative condition, differing from that contained in the original instrument; and this, in favor of the holder, more onerous than the former. It must, therefore, be considered in the light of a material alteration; and from the different appearance of the ink, it is evident it was not made at the same time when the acceptance was signed.

It is true, that the condition in the instrument, according to its last clause, seems to have been imposed under a belief that the judgment alluded to, operated as a lien on the land purchased by the acceptor; and under this belief, he requested that it should be discharged, before he would agree to pay the draft. Influenced by the same belief, the hold-

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Erasures or interlineations in the substantial part of an instrument, are presumed to be false or forged, and must be satisfactorily accounted for before the instrument can be received in evidence.

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er took upon himself to cause said judgment to be discharged, before he could rightfully demand payment of the acceptance.

Whether the judgment was a mortgage on the land or not, depended on a legal discussion; the expense of which, it may well be presumed from the tenor of the contract, the acceptor did not choose to take on himself. An acquittance of that judgment would have freed the matter from all doubt and risk; whilst the clause interlined, might leave the supposed lien to be contested between the judgment creditor and the acceptor.

Before concluding, it may not be improper to remark, that the rules in relation to this subject, cited from the Spanish and civil law, are in conformity with the law of merchants, and all systems of jurisprudence with which we have any acquaintance.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be avoided, reversed, and annulled. And it is further ordered, adjudged, and decreed, that the case be remanded to be tried *de nova*, with instructions to the judge *a quo*, not to admit in evidence the acceptance relied on by the plaintiff, until he accounts satisfactorily, for the interlineation complained of by the defendant, and that the appellee pay the costs of this appeal.

ORILLON vs. NERAULT.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT.

THE JUDGE THEREOF PRESIDING.

A vendor of the right of mortgage who warrants only the existence of his claim, cannot be objected to as a witness on the score of interest to prove possession in his vendee.

The plaintiff stated, that he was the legal owner and possessor of a tract of land, upon which the defendant had illegally entered and committed various trespasses. The petition concluded with a prayer for damages, and a decree

quieting the plaintiff in his title to and possession of the land. The defendant pleaded the general issue, and further, that Mayer then was, and had been for more than one year previous to the disturbance complained of, in quiet and peaceable possession of the land, and that the defendant was thereon by the consent and permission of Mayer.

The land in controversy had been adjudicated to Blake, who failing, the purchase money was paid by his surety, Dupuy. The latter, in consideration of its reimbursement by the defendant, transferred to him his claim for restitution against the syndics of Blake, as well as the hypothecary right which became vested in him by the payment, warranting nothing more than the existence of the right at the time of the transfer. The defendant accepted this transfer with the special warranty of the right, and renounced all right of recovery against Dupuy, on any other account. On the trial of the cause, the defendant offered Dupuy as a witness to prove possession, who was objected to by the plaintiff on the score of interest. The court overruled the objection, and the plaintiff took a bill of exceptions. There was judgment of non-suit, and the plaintiff appealed.

Burke and Davis, for appellant.

Nichols, for appellee.

Martin, J., delivered the opinion of the court.

The plaintiff states himself to have been the owner and possessor of a tract of land, when the defendant entered upon it, cut down trees, and drove off the plaintiff's hands, who were at work in repairing the levee. He prays for damages, and an injunction, provisional and perpetual, to the defendant, exhibiting further disturbances.

The defendant pleaded the general issue, and denied that the plaintiff ever was in possession of the premises; and averred, that Mayer is, and was, for one year before the inception of the suit and before the disturbance complained

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of, and the defendant was thereon, with the consent and permission of Mayer.

There was judgment of non-suit, and the plaintiff appealed.

Our attention is first drawn to a bill of exceptions taken by the plaintiff to the admission of Aubry as a witness, on the score of interest. He declared on his *wiredire*, that he had transferred to Nerault a right of mortgage, which he claimed on the premises as subrogated to the rights of Mayer's heirs. The witness had warranted the existence of his right, and nothing else ; and the transferree renounced all right of recovering any thing on any other account.

We think the judge did not err. The witness was brought in to prove possession only. He was only bound to warrant the existence of his claim.

On the merits, we think the judge was equally correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

INGRAHAM vs WHITE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF EAST FELICIANA.

The necessary absence of the counsel from indisposition, or his attendance on public business, entitles the client to a continuance ; but he cannot claim this indulgence on the voluntary absence of his counsel in attending another court, especially when another counsel is engaged and attends, and it is not alleged that the one absent is in possession of important papers, which could not be obtained from him.

The party who excepts to the opinion of the court, must take care that the bill of exceptions contain all the facts necessary to be known in revising the opinion of the inferior court.

The Code requires the magistrate to draw a process verbal of the taking of the depositions, annex *the same* to the commission and interrogatories, if there be any, and seal *the same* with his private seal.

Parol evidence may be given of the existence of articles of partnership, but not of their contents.

On the 28th of June, auditors were appointed to examine

the partnership accounts and to make their report on the second Monday in September. On the 8th of November (the auditors not having reported) the defendant's counsel had the cause set for trial on the 15th, on which day it was continued by consent until the 23d. On the day of trial, a continuance was prayed for, on the affidavit of the plaintiff: "that he could not safely go to trial, on account of the absence of E. W. Ripley, his senior counsel: that the cause had been set down for trial since Ripley had gone to Washita, and that plaintiff had not been able to inform him of the day of trial." The continuance was refused, and the plaintiff took his bill of exceptions.

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The counsel for the defendant objected to the introduction of depositions taken in New-Orleans, on the ground, that the magistrate had not affixed his seal of office, or private seal, to the certificate of the commission. This objection was sustained, and the plaintiff excepted. The defendant offered to prove by parol that, there were written articles of partnership between the plaintiff and M'Gilvary. This was opposed by the plaintiff, on the ground that, under a general denial of partnership, and without craving *oyer* of the articles of agreement, the defendant could not give evidence of a written agreement. The objection was overruled, and the plaintiff excepted. On the merits, there was judgment for the defendant, and the plaintiff appealed.

Ripley, for appellant :

1. The necessary absence of counsel, is sufficient ground for the continuance of a cause.

2. The testimony of the Dicks was improperly rejected. The only reason for its rejection was, that the judge did not affix his private seal to the certificate of the process verbal. The commission was duly sealed up. The documents, *to wit.*: commission and interrogations, were all sealed together by the judge; but to his signature to the certificate the formality of a seal was wanting. This was unnecessary.

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The 433d article of the code does not mean to require this formality. The judge was bound, 1st, to draw a process verbal; 2d, annex it to the commission and interrogatories, if there be any, and seal them with private seal, or, in other words, seal them together with his private seal, so as to identify them as belonging to the same deposition.

Hearsy, contra:

1. The plaintiff relies upon decisions of this court, in support of the position that the necessary absence of counsel is a sufficient cause for continuance, and alludes probably to the following cases for that purpose, viz.: *Patin vs. Poydrass*, 5, N. S. 639, and *Ballio et al. vs. Wilson*, 6, N. S. 334. In these cases as well as in that of *Barry vs. La. In. Co.* 12, *Martin*, 484, it was shown to the court, that the absent counsel was unable to attend, in consequence of indisposition. If absence on public duties, in which the state may enforce obedience, be also a sufficient cause for continuance, the absence of counsel, in the fulfillment of voluntary engagements, will hardly entitle a party to the same latitude of indulgence.

In the case of *Bayonjohn's heirs vs. Criswell*, a continuance was refused, notwithstanding the absent counsel, was in possession of material testimony.—5, *M. N. S.* 232.

2. The exception to the opinion of the judge, rejecting testimony, on the ground that the judge who took the deposition, did not affix his seal to the certificate of the process verbal, presents the second point. The 433d article of the Code of Practice requires a seal, which, in this case, was omitted.

Martin, J., delivered the opinion of the court.

The plaintiff and appellant complains that:

1. A continuance was improperly denied him.
2. The deposition of a witness was improperly rejected.
3. Illegal evidence was received.

I. The continuance was claimed on the plaintiff's affidavit, that "he cannot safely go to trial, on account of the absence of E. W. Ripley, his senior counsel; that the cause was set down for trial since Ripley is gone to Washita, and the plaintiff has not been able to inform him of the day of trial."

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The record shews, that on the 28th of June last, the case was submitted to referees; and, on the 8th of November, the latter having made no return, and the rule submitting the case to them not being discharged, the case was set down for trial, on the motion of the defendant's counsel, for the 15th. The referees having been directed to make their report, on the second Monday of September; and on the day of trial, the case was, with the consent of counsel, continued till the 23d, when the cause was called for trial, and the continuance prayed for and refused.

The counsel has relied on *Flower vs. McMichen*, 2, *Martin*, N. S. 132, and, 5, *id.* 232.

No objection appears to have been taken below to the absence of the report of the referees, nor to the existence of the rule; and it appears, that after the case was set down, the plaintiff's counsels did not object to its being tried without the report, but consented to its being heard on another day, than the one for which it was set down.

In the cases cited by the plaintiff's counsel, viz.: *Patin vs. Poydras*, 5 *id.* 639—*Baillio et al. vs. Wilson*, 6 *Id.* 334, and *Barry vs. Louisiana Insurance Company*, 12 *Martin*, 484, we have held, that the necessary absence, on account of the sickness of the counsel, or his attendance on public business, entitled the client to a continuance; but he cannot claim this indulgence, on the voluntary absence of his lawyer, in attending another court, especially when other counsel is engaged and attending, and it is not alleged that the absent lawyer is in possession of important papers, that could not have been obtained from him.

The necessary absence of the counsel from his disposition or his attendance on public business, entitles the client to a continuance; but he cannot claim this indulgence on the voluntary absence of his counsel in attending another court, especially when another counsel is engaged and attends,

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and it is not alleged that the one absent is in possession of important papers, which could not be obtained from him.

The party who excepts to the opinion of the court, must take care that the bill of exceptions contain all the facts necessary to know in revising the opinion of the interior court.

The Code requires the magistrate to draw a process verbal of the taking of the depositions; annex *the same* to the commission and interrogatories, if there be any, and seal *the same* with his private seal.

Parol evidence may be given of the existence of articles of partnership, but not of their contents.

We think the court did not err in refusing the continuance.

II. The deposition of one of the plaintiff's witnesses was rejected on the ground, that the magistrate who received it, did not affix his seal of office, or private seal, to the "certificate of the commission." His counsel took a bill of exceptions.

He has contended in this court, that the deposition, the commission, interrogatories, and process verbal of the execution of the commission, were all tacked together, and sealed together; the whole inclosed in a sealed cover, and this is all the law requires.

The defendants counsel has insisted, that the law requires a seal to the process verbal.—*Code of Practice* 433.

The party who excepts to the opinion of the court, must take care that the bill of exceptions contain all the facts necessary to be known here, in revising the opinion of the inferior court. The bill does not support the allegation made in this court, that there was the seal of the justice on the tape or riband by which the different papers were connected together.

The Code requires the magistrate to "draw a process verbal of the taking of such a commission, to annex *the same* to the commission and interrogatories, if there be any, and seal *the same* with his private seal."

III. The defendant was permitted to prove by a witness, that "there were written articles of partnership" between the plaintiff and another person. This was objected to, on the ground, that "under the general issue, and without craving *oyer* of the articles of agreement, the defendant could not give evidence of a written agreement.

It is not pretended that the witness was offered to prove the contents of the articles of partnership, but their existence only was offered to be proved; probably to repel oral evidence in regard to the terms on which the partners were trading together. We think the court did not err.

It is therefore ordered, adjudged, and decreed, that the judgment of the Court of Probates be affirmed with costs.

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O'DONALD vs. LOBDELL.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH
OF WEST FELICIANA.

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After the appellant has had the cause set down for argument, the appellee cannot make a motion to dismiss it.

The heir may institute suits before he accepts or rejects the succession.

A curator must settle his accounts with the Court of Probates, or annex them to his answer and file his vouchers, in order to support the plea of fully administered.

The plaintiff, as natural tutor of his infant child, claimed an inheritance in right of its deceased mother, which had descended to the latter as surviving heir of a deceased child by a former marriage.

The claim was resisted on the following grounds :

1. That the deceased mother never accepted the succession of her deceased child.

2. That the succession of the mother was never accepted for the benefit of the present plaintiff: and, further, that the curator of the succession from which the inheritance is alleged to have descended (since dead, and of whose estate the defendant is syndic) fully and faithfully administered.

To sustain the latter plea, the defendant offered in evidence, certain receipts or vouchers, the introduction of which was opposed by the plaintiff, on the ground that they were irrelevant to the issue, and because they bore no other evidence of verity save the genuineness of the signatures of the persons to whom the accounts were paid by the curator.

The objection was overruled, and the plaintiff took a bill of exceptions. There was judgment for the plaintiff and the defendant appealed.

Lobdell, for appellant.

Turner, for appellee.

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Porter, J., delivered the opinion of the court.

Previous to an examination of the judgment given in the inferior court, a motion made to dismiss the appeal must be disposed of.

This motion is grounded on the fact of the transcript not being filed on the day first fixed by the judges order. From some cause or other, the appellant found it inconvenient to do so, and obtained an order, assigning an other return day. Citations issued to the appellee on both. The 594th, 595th and 883d articles of the Code of Practice are relied on in support of the application.

We find it unnecessary to examine into, or decide on, the regularity of this proceeding, being of opinion the appellee has not complied with the rules of practice, which would enable him to take advantage of the error, if it be one.

The record was filed with the clerk of this court, on the 26th of March, 1830. The motion to dismiss is made on the 8th of March, 1831. The cause in the intermediate time has been twice continued. The first continuance, however, was for the accommodation of the appellant, his counsel being unable to attend.

The 886th article of the Code of Practice directs, that the appellee shall, within three days after the time allowed him for appearance by the citation of appeal, file with the clerk his answer in writing to such appeal. The 591st article is to the same effect.

The 890th article declares that, if the appellee neglects to answer, within the time allowed him, the appellant may have the cause set down for argument, but the appellee shall be allowed to file his answer, until the day of argument, if he only prays for a confirmation of the judgment, with costs, but if he demand the reversal of any part, or damages against the appellant, he shall file his answer at least three days before that fixed for the argument.

The succeeding article declares, that if judgment be ren-

dered without an answer being filed, it will not be less valid for such omission. Eastern District.
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We think it results from these provisions, that after the appellant has the cause set down for argument, the appellee cannot make a motion to dismiss it. If, by the rules of court, causes are not set for particular days, but taken up for argument in the order they stand on the docket, the same consequence must follow, otherwise the appellant would be deprived of the benefits conferred by the provisions cited.

After the appellant has had the cause set down for argument, the appellee cannot make a motion to dismiss it.

This action is brought by a natural tutor, who claims for his child, her deceased mother's inheritance. This inheritance is alleged to consist, in the right of a child by a former marriage of the mother, to the succession of its father, and this child having died previous to the decease of the mother, she inherited the portion which her daughter had in her deceased father's estate.

Several exceptions were filed to the petition in the court of the first instance, and overruled; one of them was, that the tutor could not maintain this action for the minor, without previously accepting the succession.

The 345th article of the Louisiana Code, provides that the tutor cannot, without an authority from the judge, by and with the advice of a family meeting, accept or refuse an inheritance, which has descended to the minor. The old code contained a similar provision.—*C. Code*, 70 art. 62.

No such acceptance was made in this instance, and the law is in negative terms, and prohibits any other. The question, therefore, raised by the exception, is directly presented for our decision.

By the Roman law, and that of Spain, the acceptance on the part of the heir was necessary to vest in him a right to interfere with the succession. Our old code recognised this principle, and declared "that until the acceptance, or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased who was the owner of the estate,—*C. Code*, 162, art. 74.

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The legislation in the Louisiana Code, has made a material change in this part of our law. The jurisconsults charged with the preparation of this work, in their report to the general assembly expressly state, that they thought it wise to "adopt the rule which vests the right of the heir from the moment of the death of the deceased."—*See report of proposed amendments, page 114.*

This was the doctrine of the ancient law of France, expressed by the well known phrase: *La mort saisit le vif.* It has been preserved in the Napoleon Code.—*Toullier, Droit Civil Français, liv. 3, tit. 1, chap. 1, no. 79, vol. 4, p. 79, Code Nap. 724.*

Some of the deductions which the courts, and commentators on the laws of that country, drew from this principle, have been adopted by our legislature and embodied in our code.—*Toullier Droit Civil Français, liv. 3, tit. 1, chap. 1, no. 82.*

The 938 article of that work declares, that "the heir being considered as having succeeded to the deceased, from the instant of his death, the first effect of this right is, that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case that he was ignorant that the succession was opened in his favour."

Article 939. "The second effect of this right is, to authorize the heir to institute all the actions, even the possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything, represents the deceased, and is of full right in his place, as well for his rights as his obligations."

Under rules, in all respects similar, it is held in France, that it is not a valid objection to an action instituted by the heir, that he has not accepted the inheritance; it must be shewn he has renounced it. *See note to 724th article of Napoleon Code by Paillette—Denevers, vol. 1, p. 473—Sirey, vol. 2, 420.*

The 940 article of the Louisiana Code declares, that the right of the heir is in suspense until he accepts or renounces. Such is also the French jurisprudence, on the Napoleon Code ; but it is considered in that country, that while the heir is deliberating whether he will irrevocably take the title, he may sue and be sued, on account of the succession ; save that in the latter case, judgment cannot be rendered against him until the time given by law for his decision expires. The provisions in our Code, authorizing the appointment of an administrator, does not appear to us to change, in anything, this right in the heir, unless steps are taken by the creditors to have such an officer appointed.—*Toullier loco citato*, Nos. 83 and 84—*La. Code* 1031, 1046, 1034, 1048.

If, indeed, on opening the succession, and before the heir accepted or rejected, it was a matter of course that an administrator should be appointed, then any act of the heir, previous to acceptance, would be irregular, and the suit could not be maintained : but, by law, the appointment of such an officer is not a matter of course. It is only after the heir has been called by the creditors to renounce, or take the inheritance, and he asks time to deliberate, that an administrator can be appointed. The result of the whole legislation on this subject we take to be, that the heir may institute suits before he accepts or rejects. It is true, if he be of the age of majority, and do so without qualification, this, in itself, will be an acceptance ; but no such consequence follows the commission of a similar act by the representative of a minor ; because the law allows only one mode for the infant under age to accept. If the creditors apprehend any danger from the heir collecting funds of a succession which he may thereafter reject, they have the power to call on him to accept or renounce ; and, in default of his immediate decision, an administrator can be placed in charge of the estate. Until they do so, however, the succession is not in abeyance, and without a representative. The law has expressly said,

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The heir may institute suits before he accepts or rejects the succession.

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that the heir represents the succession, and is seized of it, from the moment it is opened—*La. Code* 992, 1029, 1032, 1034, 1037.

The defendant is syndic of the estate of the person who was appointed curator of the succession of the first husband, through whose child, deceased, the inheritance sued for, descended to the plaintiff. This appointment of curator was made in the year 1816, and from this time to the year 1827, no steps was taken by the curator to render an account; nor does it appear that he was ever called on to do so by the mother of the plaintiff, in her life time.

The petition states, that the succession of the curator now deceased, owes one thousand one hundred and fifty dollars, the amount of Heath's estate received by him, which the syndic refuses to pay. The answer avers that the curator had fully administered the succession.

On the trial, the defendant offered several vouchers in support of his plea. Some of them were accounts paid by the Curator in his life time, and were supported by no other evidence of their correctness, save proof of the hand writing of the persons to whom these accounts were paid.

A curator must settle his accounts with the court of probates, or annex them to his answer, and file his vouchers, in order to support the plea of fully administered.

They were objected to under the pleadings, but admitted by the Court, and we think incorrectly. The defendant should have shewn a settlement in the Court of Probates, by the Curator, to sustain the plea; or if that had not taken place, he should have annexed his account to his answer, filed the vouchers in support of it, and afforded the plaintiff the means of contesting its validity and correctness on the trial.

Taking all the circumstances of the case into consideration, the presumption created by the silence of the mother for so many years previous to the death of the Curator, and that which arises from the documents admitted, we think justice requires the case should be remanded.

It is, therefore, ordered, adjudged and decreed, that the

judgment, of the Court of Probates, be annulled and reversed; and, it is further ordered, that this case be remanded to the Court of Probates to be proceeded in according to law, the appellee paying costs of the appeal.

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O'DONALD
vs.
LORENZO.

ERWIN'S EXECUTORS vs. TRION

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE OF THE THIRD PRESIDING.

A continuance was properly denied where the party appeared generally, to have neglected the means of preparing his defence—and under such circumstances, the Court did not err in refusing a new trial.

This suit was instituted on the 8th April, 1830. At the ensuing June term, it was continued by the defendant, who obtained an order to take the testimony of a witness residing in the State of Mississippi. On the 13th November, he filed his interrogatories, and on the 17th, caused them to be served on the plaintiffs, with notice that on the 28th he would take the testimony of the witness.

On the 14th December, the cause was called up for trial, when a continuance was prayed for on the affidavit of counsel:—"That owing to the absence of the Sheriff and the sickness of his Deputy, service could not be made of the interrogatories until the 17th, which was too late; but affiant believed, that could the service have been made on the 13th, which defendant vainly attempted to affect, there would have been sufficient time for the return of the Commission. The continuance was refused, the cause tried, and a judgment rendered for the plaintiffs. The defendant prayed for a new trial, on affidavit, stating that he had attended during the term for the trial of the cause, and upon a temporary adjournment, had returned home—That he was prevented from attending, on the day of trial, from the badness of the roads, inclemency of the weather, and a belief that Court would not meet. The Court refused a new trial, and the defendant appealed.

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April 1881.

BRWINS, EXRS.
vs
TRJON.

Heriart, for appellant.

Pierce, for Appellee.

Martin, J., delivered the opinion of the Court.

The defendants sued for the price of a plantation and slaves, purchased by an authentic act, from the plaintiff's testator, pleaded that the contract, sued upon, had by a posterior act of the vendor, been new modelled and changed, and the terms of payment extended, and he bound himself to receive in payment a certain judicial mortgage. The premises are burthened with several mortgages, the cancelling of which was to be obtained before payment was to be made, by the defendant, and he is entitled to a diminution of price on several of the slaves, who are afflicted with redhibitory diseases—and the plaintiffs have refused to receive the judicial mortgage, obtain the cancelling of the mortgage, or to allow any diminution of price.

There was judgment for the plaintiffs, and the defendant appealed, after an unsuccessful attempt to obtain a new trial.

The case has been submitted to us without any argument, and the appellant has not filed any points.

A continuance was properly denied where the party appeared generally to have neglected the means of preparing his defence—and under such circumstances, the Court did not err in refusing a new trial.

The record shews that he offered no evidence in support of his plea. The new trial was asked on an affidavit of the defendant having been prevented by bad weather, and his belief that the court would not meet, from attending to move for a continuance. As the district court refused it: the new trial, and the party appears to have greatly neglected the means of preparing his defence, we cannot say the new trial was improperly denied.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

DELEE vs. WATKINS vs. ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,
THE JUDGE THEREOF PRESIDING.

The charge of fraud cannot be supported by alleging the neglect of the

officer who sold, in complying with any of the formalities required by law, unless it be shewn that the party charged was cognizant of his non compliance, or knowingly availed himself of it.

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t.

On the 24th of October, 1828, Watkins sold to Crawford a lot of ground, and received in part payment, the note of the latter, secured by mortgage. The note was endorsed to the plaintiff, duly protested, and legal notice given. On the 21st August, 1829, the lot was sold to pay the state and parish taxes, and Gordon became the purchaser. The petition charged fraud and collusion between Crawford and Gordon, in causing the lot to be sold, and prayed for judgment against the maker and endorser—That the plaintiffs right of mortgage, as indorsee, might be declared superior to Gordon's title: That the sale to the latter might be cancelled, and the lot sold to satisfy the plaintiffs demand. The defendants pleaded the general issue—there was judgment against the maker and indorser, without recourse upon the lot; the sale of which, to Gordon, was decided to be legal. From this judgment the plaintiff appealed.

Turner, for appellant, contended :

1st. The judgment is erroneous in not having decreed, that the property mortgaged was liable to be sold to pay the mortgaged debt.—C. C. art. 3360.

2. The sheriff's sale, for tax, is not good as no advertisement is shewn—the recital in the deed not being proof of it against third persons. The seizure was not authorized by law. The property had passed into the possession of a third person before the assessment was made, or the tax became due. If this position is not correct, still the state had no prior lien upon the lot superior to the plaintiff, and if it had, it was not for a sum exceeding eighty-four cents. The Parish having no lien, and if it had, it was only for \$1.44, and the levy could not be made but upon a return of no personal property.

Downs, for the defendant, *Gordon*, contended,

1st. That even if the plaintiff have a right of mortgage

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on the property superior to that under which the lot was sold, yet this does not give him a right to annul the sale to Gordon. The sale of mortgaged property does not affect the mortgagee, but he must pursue the hypothecary action regularly, and cannot pray to have the sale annulled.

2. As an hypothecary action, the plaintiffs demand must fail against Gordon, because he has not pursued that form of action regularly: there being no allegation or affidavit, that demand was made of the debtor thirty days before suit was filed, and that the debt is really due and unpaid.—*C. P. art. 70—6 Martin, N. S. Brusard vs. Phillip.*

3. The lot was regularly sold to Gordon under a claim for taxes, which operated a lien superior to all others, and destroyed the lien of plaintiff.—*2d Moreau's Dig. p. 456, sec. 20.*

Martin. J., delivered the opinion of the court.

The two first named defendants are sued as maker and endorser of a promissory note, given for the price of a lot, secured by a mortgage on the premises. Gordon, the third defendant, who purchased the lot at a sheriff's sale for taxes, is charged with having combined with the maker of the note, for the purpose of defrauding the plaintiff, and causing the lot to be sold for taxes pretended to be due, when Gordon purchased it for the taxes and costs only, in a sale which is averred to be fraudulent. The petition concludes with a prayer for judgment against the maker and endorser, and that the plaintiff's mortgage may be declared to be superior to Gordon's claim; that the sale of the lot to him may be declared to be fraudulent and void; and that it may be decreed to be sold to satisfy the plaintiff's demand.

The general issue was pleaded: there was judgment against the maker and endorser, and in favour of the other defendant. The plaintiff appealed.

The statement of facts shews, that the signature of the

maker and endorser, the protest and notice, were proven, as well as the mortgage of the lot for the security of the price. The tax list for the year 1828, the lot having been sold in the month of October of that year, was produced, showing the taxes due by the owner of the lot, the then vendor and maker of the note, as well as the sheriff's deed of sale to the last defendant.

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The appellant's counsel has urged that the judgment is erroneous, as it does not decree the sale of the mortgaged premises—*La. Code*, 3360—as the sheriff's sale is not shewn to be good: as proof is not made of any previous advertisements, and the seizure was illegal, as the premises had passed into the hands of a third person, before the assessments or the tax became due. That the sheriff sold for all the taxes due by the owner of the lot, including the parish tax, for which there is no lien; and the lot could not be sold until after a return that no personal property could be found.

The appellee's counsel has urged that, if the plaintiff has a claim superior to the purchaser's, he ought to have exercised it in an hypothecary action; the sale of mortgaged premises, not authorizing the mortgagee to demand that it be cancelled, but only that, notwithstanding it, the premises be sold to satisfy him—that the lien of the State for taxes was superior to the plaintiff's mortgage.—*2 Moreau's Digest*, 456, sec. 20.

It does not appear to us that the District Court erred. The rescision of the sale was asked on a charge of fraud, collusion and combination, between the defendants. On this, the burden of the proof, lay upon the plaintiff. Fraud must be proved. Till some evidence, from which it may be held to result be administered, the party against whom it is alleged, cannot be called on to disprove it. Here irregularities, in the sale, on the part of the sheriff, are alleged—these may affect the sale, but do not show any fraud on the part of the defendant. The issue is *fraus vel non*, and can-

The charge of fraud cannot be supported by alleging the neglect of the officer who sold in com-

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plying with any of the formalities required by law, unless it be shown that the party charged was cognizant of his non compliance or knowingly availed himself of it.

not be supported by alleging the neglect of the officer in complying with any of the formalities required by law, unless it be shown that the party charged was cognizant of them, or knowingly availed himself of them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

McDONOUGH vs GORMAN ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Clerks of courts have the exclusive right of copying, or causing to be copied, the documents of which they are authorized to issue copies. They are answerable for the due and timely issuing of these copies, and for their correctness and fidelity; and the parties have not the right to perform services which the law imposes upon clerks, and thus to deprive these officers from any part of the compensation which the law has provided for them.

The clerk has a right to charge for the copies, although he use those which are furnished by the plaintiff.

Copies of papers coming from a clerk's office must be official. He must certify that they are true copies; and may charge for the certificates, but not for affixing to them seals.

Copies of citation require no seal.

Judgments of non-suit are considered as final in the cause, and whether they be entered up in one or more entries, the clerk has a right to charge against each defendant.

The costs may be taxed, although not required by either of the parties.

The clerk cannot charge for recording citations, and for certifying the recording of petitions, answers and citations.

The defendant, clerk of a court, charged for copies of the petition and citation, although they were made out, printed and furnished to him, by the plaintiff, at the expense of the latter. A charge was also made for certificate and seal to each copy of petition and citation; and a further charge for entering up judgment of non-suit against each defendant, notwithstanding it was recorded in a single entry. The clerk having issued execution, it was enjoined by the plaintiff, and upon hearing dissolved—from which judgment the plaintiff appealed.

McCaleb, for appellant, made the following points:

1st. The office of clerk is established for the convenience of the *public*, not to give privileges and confer benefits on the *individuals holding the offices only*. They are only to be paid for services rendered, and as the clerk *did not copy* the petition, the charge is inadmissible.

2. The item for certificates—the law does not require,—so with the item for seals, none being required to copies of petitions.

3. The item for *copies of citation*, not chargeable. The services were not performed and no seal is required.

4. The judgment of *non-suit* was but *one judgment*, therefore only *one dollar* chargeable, even if a *non-suit* be a definitive judgment, which is doubted.

5. The charges for *taxing costs* not allowable, for they have never been required by either party.—C. P. 177, 178, 179, 183, 200; 1st Moreau's Dig. p. 462, sec. 1, Ibid p 468, sec. 15, 17; 2d Martin's rep. p. 146; 1st do. N. S. 258; 3d do. N. S. 580.

Preston, contra :

1st. A party plaintiff cannot deprive a clerk of his fees by doing his duty. The Code of Practice, art. 178, enjoins on the clerk *to make out a faithful and exact copy of the petition* and the fee bill gives *him the fee*. He is responsible for its correctness, must examine and correct it even if printed, and must have the compensation.

2. The copy of the petition should be certified and sealed, and is no otherwise authentic; and for this the law provides the fee charged.—1st Moreau's Dig. p. 464. The charge made by the clerk is conformable to universal practice, not only of clerks, but of all keepers of public records.


3. The citations were sent out in originals and copies, conformably to law and practice; the one to be left, the other to be returned, served.

4. The costs *were due from each defendant for the service rendered him*; and are, therefore, to be *taxed and filed*, and certificate to be allowed if required.

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5. The citations were certainly to be recorded, under the act of 1825, to shew that defendants had been made parties to the suits, if the originals should ever be lost; and it is but prudent to certify that each original paper was recorded, least the record should be lost.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant of a judgment dissolving an injunction which he had obtained, to prevent one of the defendants as sheriff, and the other as clerk of a district court, from leveying out of his estate, the amount of certain costs claimed from him, the plaintiff, on the ground of their being illegal.

The statement of facts shew, that it was admitted by the plaintiff, that the defendant, in a certain case in which the former was plaintiff, issued seventy-eight copies of the petition with certificate and seal, there being so many defendants; each of which copies contained the number of words charged for; and he issued an equal number of citations with certificate and seal; filed an equal number of answers, each of which contained the number of words charged for, and entered the like number of nonsuits; but all of them in one entry. All the other services for which a remuneration is claimed are admitted, except that costs have been taxed according to the account sued on.

The defendant admitted, that the petitions and citations were printed and furnished by the plaintiff, by whom all the blanks were filled up, except the day of issuing was written by the defendant, who signed and sealed the same. Printed answers were furnished by the defendant, but he filled all the blanks in them.

The item first objected to, is a charge of four hundred and forty-one dollars and eighty-seven cents for copying seventy-eight petitions. It is claimed under the third article of the act of 1813, 1 *Moreau's Digest* 463. It is resisted, on the ground, that the defendant did not actually write the

copies, printed ones having been furnished him, at the expense of the plaintiff.

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Clerks of courts have the exclusive right of copying, or causing to be copied, the documents of which they are requested to issue copies.— They are answerable for the due and timely issuing of these copies, and for their correctness and fidelity; and the parties have not the right to perform services which the law imposes upon clerks, and thus to deprive these officers from any part of the compensation which the law has provided for them.

The clerk has a right to charge for the copies, altho' he use those which are furnished by the plaintiff.

Copies of papers coming from a clerk's office must be official. He must certify that they are true copies; and may charge for the certificates, but not for affixing to them seals.

It does not appear to us, the first judge erred, in overruling the opposition of the plaintiff to this charge. Clerks of courts have the exclusive right of copying, or causing to be copied, the documents of which they are requested to issue copies. They are answerable for the due and timely issuing of these copies, and for their correctness and fidelity; and the parties have not the right to perform services which the law imposes on clerks, and thus to deprive these officers from any part of the compensation which the law has provided for them. The plaintiff's counsel has not denied this, but has contended, that the defendant having voluntarily accepted printed copies from the plaintiff, for the express purpose of preventing the necessity of written ones, has waived his claim to furnish, and consequently to charge for, the latter. Every condition is, in our opinion, in a moral point of view, tacitly added to a contract which it is indisputable would have been agreed to by both parties, had it been proposed; and the converse of this proposition is equally true. Now in offering the printed copies to the defendant, if the plaintiff had proposed to him to renounce his right to charge for copying, it is clear they would not have been accepted: for the defendant could himself have had the copies printed for, perhaps, less than the hundredth part of what he was authorized to demand for them.

Another charge excepted to is, that of \$19 50, for the certificate at the foot of each copy. This charge is allowed by the third article—*id.* 464—for every necessary certificate, and it is resisted on the ground, that the Code of Practice does not require copies to be certified,

We think it was properly admitted. Copies of papers coming from a clerk's office must be official. He must certify they are true copies.

The next charge is of \$39, for seals to these certificates,

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Copies of citation require no seal.

Judgments of non-suit are considered as final in the cause, and whether they be entered up in one or more entries, the clerk has a right to charge against each defendant.

The costs may be taxed, although not required by either of the parties.

The clerk cannot charge for recording citations, and for certifying the recording of petitions, answers and citations.

We think it was improperly allowed. We find no specific allowance to clerk's for the seal to any copy. Copies being documents specified in the first section of the act of 1813, which are excluded in the first article of page 464.

Another, is a charge of thirty-nine dollars fifty cents, for seventy-eight copies of citation and seal, claimed under the 5th art. p. 463, resisted on the ground, that the Code of Practice requires citations to be sealed, and is silent as to copies. The objection was correctly overruled.

A charge of one dollar as to a judgment of non suit, for each defendant, they having severed in their pleas, was objected to, on the ground that it is doubtful that such a judgment is a final one; and the Code of Practice, 559, is referred to; and on the ground, that judgments in all the seventy-eight cases, were recorded in a single entry. We have often sustained appeals from judgments of nonsuit, on the ground of our considering them as final in the cause. The mode of entering the judgments, in one or more entries, is an immaterial circumstance, it has no bearing on the rights of the parties, and in either, the consequence is the same. The charge appears to us a legal one.

A charge for taxing costs is made, under the last article but one, in p. 463, and objected to, as they were not required to be taxed by either party. We think there is nothing in the objection.

The four last charges but one, amounting together to forty two dollars and sixty-eight cents, for recording citations, and for certifying the recording of petitions, answers and citations, are claimed under the act of 1825—2 *Moreau's Dig.* p. 293—do not appear to come within any of the provisions of the act.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided and reversed and that the injunction be made perpetual, as to the sum of eighty-one dollars and sixty-eight cents, and dissolved as to the remainder. The appellant paying costs in the District Court, and the appellee in this.

ROY vs. WILEY ET AL.**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

A plaintiff who is interrogated may write his answers on one piece of paper and his oath on another.

Martin, J., delivered the opinion of the court.

The defendant sued for the balance of an account for slates sold and delivered to them; pleaded the general issue, and that they were charged by the short thousand instead of the long, contrary to their bargain.

There was judgment against them, and they appealed.

At the trial their counsel took a bill of exceptions to the opinion of the court, in overruling their objections to the reading of the answer of the plaintiff, to interrogatories propounded to him in the answer, on the ground that the interrogatories were not sworn to.

A plaintiff who is interrogated, may write his answers on one piece of paper and his oath on another.

The answers to the interrogatories, and two copies of accounts, which the plaintiff was called on to produce, were written on separate pieces of paper, and marked A, B and C, and on another piece of paper was written the plaintiff's oath, that one of the papers contained his answers to the interrogatories, and the others the true accounts called for.

The case has been submitted without an argument, and we are unable to discover on what ground the objections can be supported.

On the merits. The record shews that one of the partners promised to pay the balance, but the other contended the slates had been bought by the long thousand, i. e. 1,200 slates to the 1000; but the evidence did not support the allegation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

SHEPPARD vs. HIS CREDITORS.**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

The losses sustained by an insolvent must be shewn by the affidavit of two witnesses.

One creditor cannot be called before a notary to deliberate on his or the

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insolvent's affairs. Meetings of creditors take place in order that the minority may be compelled to abide by the decision of the majority in sums or claims, and where there are less than three creditors there cannot be a majority.

If an insolvent has a right to cede his goods to an only creditor, he ought to have him cited into court. Less than three creditors cannot form a concourse, for there is no minority to be coerced.

The opposing creditor was placed on the schedule of the insolvent for \$525. Three other creditors were placed thereon, as having, in 1821, claims against the insolvent and his former partner, amounting in all to \$2700, the payment of which was assumed by his partner, upon a dissolution of the firm; but whether paid or not, the insolvent did not know. He exhibited credits and property to the value of \$346, and stated that he had sustained losses to the amount of \$250.

The opposing creditor prayed that the proceedings be set aside, on the following grounds, *to wit.*: first, that he had never been cited: second, that the insolvent appeared to have but one creditor: and, third, that if there be more than one creditor, the value of the property surrendered did not amount to one third of his debts, and there was no proof that the insolvent had sustained the losses stated in his schedule, or that the said losses had reduced him to the situation in which he found himself. The proceedings were set aside, and the insolvent appealed.

Farrar and *M^cCaleb*, for appellant.

Strawbridge, for appellee.

Martin, J., delivered the opinion of the court.

The insolvent made a cession of his goods and prayed for a meeting of his creditors.

Turner was placed on the schedule as a creditor of \$525, and two other creditors, as members of a firm, were placed thereon for \$2700; but the debtor stated, a former partner of his, and joint debtor, had promised to pay the whole of the debt; but whether he had or not, was a fact on which he was not informed.

Turner prayed that the proceedings be set aside, as he was not cited, and was the only creditor; and if the other two persons had not been paid, then the property surrendered was not worth one third of the debts, and the insolvent should have added the affidavit of two witnesses, attesting their belief of the losses he urged he had sustained.

The proceedings were set aside and the insolvent appealed.

Surely if there were three creditors, and the debt of \$2700 was unpaid, the property surrendered being appraised at less than \$400, the proceedings were properly set aside for want of the affidavit required by the act of 1817.—2, *Moreau's Digest*, p. 346, sec. 7.

If the debt was paid, then there was no creditor but the appellee, and he could not properly be called to a notary's office, in order to deliberate on his or the insolvent's affairs. Meetings of creditors take place, in order that the minority may be compelled to abide by the decision of the majority in sums or claims, and when there are less than three creditors there cannot be a minority.

Whether he who has but one creditor, may compel him to accept a cession, or whether he who has two may prevent the one whose debt is payable, from exercising his right to the injury of the other whose day of payment is distant, are questions not involved in the present case, which turns on a mere point of practice.

If the appellant had a right to cede his goods to the appellee, his only creditor, he ought to have cited him into court. Less than three creditors cannot form a concurso, for that there is no minority to be coerced—" *Para que se admite el concurso y se estime por legitimo y verdadero, y no fieto ni fraudulente, tenga el deudor a lo menos tres acreedores y los nombre; pues no teniendo ó han nombrando mas que dos, no se estimaran por concurso, ni el juez se les debe admitir.*—*Febrero, Juicio de Concurso*, 3, 3, sec. 1. N. 10."

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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The loss sustained by an insolvent must be shown by the affidavit of two witnesses.

One creditor cannot be called before a notary to deliberate on his or the insolvent's affairs—meetings of creditors take place in order that the minority may be compelled to abide by the decision of the majority in sums or claims, and where there are less than three creditors there cannot be a majority.

If an insolvent has a right to cede his goods to an only creditor, he ought to have him cited into court—less than three creditors cannot form a concurso, for there is no minority to be coerced.

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ERWIN ET AL. vs. ADAMS.

ERWIN ET AL

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ADAMS.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT,
THE JUDGE OF THE THIRD PRESIDING.

A demand of payment must be made at the place designated if it exist ; if it does not, the plaintiff will recover without.

This was an action against the maker of a promissory note, made payable at the counting-house of Wm. Kenner and Co., in New Orleans.

At the time the note became due, Kenner and Co. had a counting-house in New-Orleans ; but it had ceased to exist at the inception of the suit. The plaintiffs failing to prove a demand, there was judgment of nonsuit, from which they appealed.

Mathews, J., delivered the opinion of the court.

This is a suit against the maker of a promissory note, by the executors of the payee. Judgment of non-suit was rendered in the court below, from which the plaintiffs appealed.

We shall consider the case as submitted without argument. It is true that a brief was handed to the court, signed by Jno. G. Burk, as attorney for the plaintiffs, in which he seems to have departed almost entirely from the substantial merits of the cause, for the purpose of attacking our decision in the case of *Mellon vs. Croghan*, to be found in 3 *N. S. p.* 423. His commentaries on this decision, are made in a style and manner so disrespectful, and contain insinuations so improper, that his brief of argument must be rejected, and the clerk of the court be required to return it to him, after taking a copy, leaving further time to consider whether the interest of the public and a proper respect for our official standing, may require any other notice of the offender.

Before proceeding to the investigation of the present cause, it is proper to remark that we consider the decision of the case cited, as altogether correct, and it would govern us in

that now under consideration, were the facts entirely similar.

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April 1831

ERWIN ET AL.
vs.
ADAMS.

The note on which this action is founded, was made payable at the counting-house of Wm. Kenner & Co., in New-Orleans; and it does not appear in evidence, that any demand was their made; but it is admitted in the statement of facts, that previous to the commencement of the present suit, the firm had failed and they had no counting-house. This circumstance changes the situation of the parties now before the court, from that of the suitors in the case cited. In that case, it is no where decided that a demand, at the time the note became due, was necessary to charge the maker, but it was considered as a condition precedent to the right of recovery on the part of the plaintiff, that a demand of payment should be made at the place designated, previous to the institution of the suit—*sed lex nemini cogit ad vana et impossibilia*. And, in the present case, it is agreed that at the time of commencing the action, it was impossible to make a demand of payment at the place designated in the note, for no such place existed.

A demand of payment must be made at the place designated, if it exist—if it does not, the plaintiff will recover without.

It is, therefore, ordered, &c. that the judgment of the District Court be avoided, reversed and annulled, and proceeding here to give such judgment as ought then to have been given.

It is further ordered, adjudged and decreed, that the plaintiffs and appellants do recover from the defendant and appellee twenty-four hundred and forty-seven dollars and twenty-two cents, with ten per cent, *per annum*, interest thereon, from the 4th of April, 1823, until paid; and that the defendant and appellee pay costs in both courts.

FORSYTH vs. LACOST.

2L 319
51 870

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The plaintiff, against whom an injunction has been obtained, may compel the defendant to prove, in a summary manner before the judge, the truth of the facts alleged in his opposition; and the proper mode of proceeding is by

Eastern District
April 1831.

FORSYTH
vs.
LACOST.

serving a rule on the defendant, to show cause, why his injunction should not be dissolved. Upon a proper showing, the rule will be continued, to enable the party to procure the necessary proof required by the seizing creditor.

The act of the creditor in withdrawing the deposite made by the debtor, of the amount which he believes to be due, is not conclusive that nothing more is owing.

The plaintiff, in an order of seizure, took a rule upon the plaintiff in injunction, to show cause why it should not be dissolved, on the ground that the allegations in the petition were not true. Upon hearing, the injunction was dissolved, and the plaintiff appealed.

Morse, for appellant,
Grymes and Cannon, for appellee.

Mathews, J., delivered the opinion of the court.

In this case, the present defendant, had obtained an order of seizure and sale of certain property of the plaintiff, who obtained an injunction to stay proceedings. The injunction was afterwards dissolved, in relation to a part of the sum claimed by the seizing creditor, and made perpetual, as to the residue; and from this decree of dissolution the plaintiff appealed.

The injunction was obtained on the ground of alleged payments, made by the debtor, of part of his debt, and a deposite in court, of what he considered as the balance due, which was delivered up to the creditor by order of the court; and afterwards the injunction was dissolved (as above stated) on motion, &c. Against the correctness of the judgment of the court below, the appellant's counsel assumes two means of defence. One is rather of form; the other partakes of the merits of the case. The first is against the proceeding by motion to dissolve the injunction; the propriety of which depends on our code of practice; the article more particularly applicable to the present case, is the 741, and is expressed in the following words:—"The plaintiff, against whom an injunction has been obtained, may

compel the defendant to prove, in a summary manner, before the judge, the truth of the facts alleged in his opposition." No rules are laid down as to the mode of proceeding in this summary manner. It must, therefore, be left to the discretion of the judge; and we are unable to imagine any more proper and convenient, for the despatch of business, than a rule served on the defendant to shew cause why his injunction should not be dissolved. The time absolutely necessary for him to make the proof required by the seizing creditor, can as well be granted in this way as any other, by continuing the rule, should it be found necessary, to enable the party demanding the continuance to procure his testimony. It is true, that an affidavit was made by the plaintiff, in the injunction, of the absence of material witnesses, one residing out of the State, and another out of the Parish; but no steps were taken by him, or offered to be taken, to procure their testimony by commission. The affidavit was not sufficient to authorize a continuance.

The second ground of defence, rests on the effect which must be given to the circumstance of the creditor having withdrawn the money deposited in court by the debtor.— On the part of the latter, it is contended that this act amounts to a tacit acknowledgement of the truth of all the allegations in his petition; in other words, that is a legal presumption of their truth. They are, however, denied by the defendant, in his motion for a rule to shew cause, &c. This denial, we are of opinion, outweighs the act of receiving the money deposited, even admitting that such presumption would be a necessary consequence of the act, (which is by no means clear.) The deposit was an acknowledgement, by the party, that he owed that amount, and he was both legally and morally bound to pay it to his creditor, leaving contested matters to be afterwards settled.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs; re-

Eastern District,
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FORSYTH
vs.
LACOST.

The plaintiff against whom an injunction has been obtained may compel the defendant to prove, in a summary manner before the judge, the truth of the facts alleged in opposition; and the proper mode of proceeding is by serving a rule on the defendant to shew cause why his injunction should not be dissolved. Upon a proper showing, the rule will be continued, to enable the party to procure the necessary proof required by the seizing creditor.

The act of the creditor in withdrawing the deposit made by the debtor, of the amount which he believes to be due is not conclusive that nothing more is owing.

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April 1831.

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serving to the plaintiff in the injunction, his right to recover, if any he has, in another action, the sum of two hundred and seventy dollars, alleged to have been paid to the defendant by Judge Leonard's acceptance.

Louisiana	2	322
	109	468

MARIGNY vs. STANLEY ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT,
THE JUDGE OF THE FOURTH PRESIDING.

If the appellant does not comply with the condition upon which the appeal has been granted by giving bond to prosecute the appeal, and suffers a year to elapse, the judgment becomes *res judicata*, and he cannot be relieved either by the District or Supreme Court.

The facts are stated in the opinion of the court, delivered by

Martin, J.

The defendants and appellees demand, the dismissal of the appeal, on the ground that it was not regularly taken, and prosecuted within the year, after the judgment was rendered, and the plaintiff and appellant residing within the state.

The judgment was rendered on the 4th of November, 1829, and on the 28th of October, 1830, an order was made for allowing the appeal on bond and security being given. On the 24th of December following, about fifty days after the expiration of one year since the judgment was rendered, the judge of the eighth district, on a suggestion, unsupported by any evidence, that "owing to the great number of defendants and other causes, there had not been notice for the service of the citations, made in order for a prolongation of the return day, on bond and security being given, according to the original order. And which security was accordingly given, and on or before the 17th January following, the citations were all served,

On these facts, the counsel of the appellees has contend-

ed, that the prescription, in case of appeal, is interrupted, like in the case of any other suit, by the service of the citations; but that admitting that the allowance of the appeal interrupts the prescription when the condition on which it is granted; *i. e.* giving bond with security, is complied with—it does not when the appellant fails in giving bond within the year. On such a failure, the judgment becomes *res judicata*, at the expiration of the year. So it did in the present case. Further than the prolongation of the return day can be granted in no case, but by the supreme court, on suggestion of the record having been prevented from being timely returned, by an event beyond the appellant's control, and on due proof being made of this event.—*Code of Practice* 883.

Eastern District,
April 1831.
MARIGNY
vs.
STANLEY ET AL.

In the present case, no evidence was offered of such an event, and the original order made the appeal returnable to the first Monday in January; allowing sixty odd days. The appellant suffered fifty odd days to elapse before he dreamed to give bond. Till this was done, nothing authorized the clerk to prepare citations or a transcript. To this circumstance it was owing that there was no time left to serve the citations, and no other.

The appellant's counsel has urged, that the judgment was signed too soon; *i. e.* on the day it was rendered, and it has not yet become final:—that it was never notified to the party; and the district judge had the right of prolonging the return day.

Judgments in the district courts bear date of the day on which they are rendered. In signing them three days after, the judge seldom adds a date to his signature. Sometimes he signs before the expiration of the three days. His signature does not prevent a motion for a new trial within that period, though it does afterwards, although affixed prematurely; and the judgment becomes final, in the lower court, by the lapse of the three days.

Eastern District
April 1831.

MARIGNY
vs
STANLEY ET AL.

If the appellant does not comply with the condition upon which the appeal has been granted, by giving bond to prosecute the appeal, and suffers a year to elapse the judgment becomes *res judicata*, and he cannot be relieved either by the District or Supreme Court.

If the judgment be not final, this is rather a reason to demand than to reject a dismissal.

The service or notification of a judgment is necessary to prevent a prayer for a suspensive appeal being made too late, but for no other purpose.

We think the compliance with the condition on which the appeal is allowed, i. e. giving bond, is necessary to render the allowance absolute, so as to interrupt the prescription. Through the neglect of the appellant in this case, the judgment became *res judicata*, on the expiration of the year: neither the district judge nor this court, could afterwards relieve the appellant.

Let the appeal be dismissed with costs.

MARIGNY vs. INGRAHAM

APPEAL FROM THE COURT OF THE THIRD DISTRICT,
THE JUDGE OF THE FOURTH PRESIDING.

Martin, J., delivered the opinion of the court.

This case is perfectly similar to that of *Marigny vs. Stanley et al.*, just decided.

It is therefore ordered, adjudged, and decreed, that the appeal be dismissed with costs.

TERRAN vs. DE LASTRA

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW ORLEANS.

A copartner has no interest in a note given to his partner not for the benefit of the firm, and which is not endorsed to him.

Payment by a firm will not support a claim in compensation between one partner and the person for whom it was made.

This suit was brought to recover the sum of three hundred and sixteen dollars ninety-two cents, which the plaintiff alleged had been improperly charged to him in an account current, rendered by the defendant in 1828.

Eastern District.
April 1881.

TERREAN
vs.
DE LAUTRA.

The defence set up was, that in 1812, the commercial house of De la Teja, of which the defendant was a partner, had paid the amount claimed to satisfy a judgment which one Serna had recovered against the plaintiff. It appeared from the evidence, that the house of De la Teja had paid, for the plaintiff, the amount charged to him by the defendant, in the year 1814, and that the defendant did not become a partner until 1815.

There was judgment for the plaintiff, and the defendant appealed.

De Armas, for appellant.

Conrad, for appellee.

Martin. J., delivered the opinion of the court.

The plaintiff demands a sum of three hundred and odd dollars, which he alleges the defendant unjustly and incorrectly debited him with, as having been paid by him, the defendant, to Latone, for the plaintiff; the said account being balanced by said charge, while, if the charge be stricken out, as it ought to be, a balance of the same amount is due to the plaintiff.

The defendant pleaded the general issue; and that he had paid the sum claimed, to Latone, agent of a house in Mexico, who having obtained a judgment there against the present plaintiff, had seized the funds due to the latter, by a house in Mexico, of which the defendant was a partner.—There was a charge in reconvention.

There was a verdict and judgment for the plaintiff, and the defendant appealed after an unsuccessful attempt to obtain a new trial.

The record shows that, Cucullu, a witness for the plaintiff, proved that the account annexed to the petition, is signed by the defendant, and in the hand writing of his clerk.

Latone, a witness for the defendant, deposed that he was the agent of Serna: and in the year 1814, the plaintiff was

Eastern District,
April 1881.


TERRAN
vs.
DE LASTRA.

indebted, to the latter, in the sum of eight hundred dollars. which sum was paid by the house in Mexico, referred to in the petition, who were indebted to the plaintiff. This was in the year 1814.

It was proven the defendant became a partner of that house in 1815.

A copartner has no interest in a note given to his partner not for the benefit of the firm and which is not endorsed to him.

The plea of reconvention was on a note payable to an individual, of whom the defendant avers himself to be, and is proved to be in partnership. But it is not made payable to the firm, but to an individual member of it, and is not endorsed.

Payment by a firm will not support a claim in compensation between one partner and the person for whom it was made

It appears to us, the jury did not err. It is not shewn the defendant was a member of the house who made the payment at the period it was made. Had it been proved he was partner at that time, the charge would not support an item of set off or compensation, in an account current between one partner and the person for whom it was made.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish court be affirmed with costs,

21 326
45 1270
2 326
112 171

ELLIOTT, ET AL. vs. LABARRE, ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The sale of minors property, or that of a succession, where the heirs are absent, must pursue the forms of law directed for its alienation or the sale must be annulled.

The authority of the judge of Probates is necessary to enable the Register of Wills to sell. The latter is merely a ministerial officer and can make no disposition of the property of a succession, unless under the direction of the judge, to whom the law intrusts its control.

The heirs of Elliot brought suit to recover a lot of ground which belonged to their ancestor at the time of his death, and of which they alleged the defendants were in possession under an invalid title.

It appeared that the ancestor died in New-Orleans in 1811, leaving a widow and minor heirs residing in South-Carolina. His succession was administered upon as vacant

and on the 26th October, 1811, the lot in question was sold by the Register of Wills, but not under the order or by the direction of the judge. Under this sale the defendants set up title. There was judgment for the defendants, and the plaintiffs appealed.

Eastern District.
April 1831.

ELLIOT ET AL.
vs.
LA BARRE & AL

Hennen, for appellants.

Moreau and *Soulé*, for appellees.

Porter, J., delivered the opinion of the court.

A certain Christopher R. Elliott died in New-Orleans in the year 1811, and his widow and heirs not residing in this State, his succession was administered on as vacant, and a curator appointed to it. Among the property left by him was a lot situated in this city. It was sold under the authority of the Court of Probates, and this action is brought by the heirs of the deceased, to evict the possessors claiming title under that sale. The plaintiffs allege it was made without the formalities of law, and that it does not divest them of the title which they inherited from their ancestor.

The defendants have cited their vendor, and he has called in the person who sold to him. The answers of the persons thus made parties, deny the allegations contained in the petition, and further aver, that large improvements have been made on the property since it came into their hands, the value of which the plaintiffs must reimburse to them before they can recover.

The grounds on which the plaintiffs consider the sale void are as follow :

1. The property was sold without the order of the judge.
2. It was sold by the Register of Wills.
3. There was no attorney appointed to represent the absent heirs.
4. The usual and necessary advertisements were not put up, and the property was not advertised for a sufficient length of time.

Eastern District,
April 1881

ELLIOT ET AL.
vs.
LA BARRE ET AL.

The sale of minors property, or that of a succession, where the heirs are absent, must pursue the forms of law directed for its alienation or the sale must be annulled.

The authority of the judge of Probates is necessary to enable the Register of Wills to sell. The latter is merely a ministerial officer and can make no disposition of the property of a succession unless under the direction of the judge to whom the law intrusts its control.

We have kept this case a longer time than usual, under advisement, from an indisposition to disturb, after twenty years' possession, a sale of property which we have every reason to believe was made *bona fide*. After giving to the case, however, as attentive a consideration as it is possible for us to bestow on any presented for our decision, we have come to the conclusion, that the provisions of law which govern the facts before us, and the principles of our jurisprudence applicable to these provisions, are too imperative to be sacrificed to the ideas of equity, which our minds may suggest. The sale of minors' property, or that of a succession, where the heirs are absent, must pursue the forms of law directed for its alienation, or the sale must be annulled.

The conveyance derives its force and validity entirely from the law, and where that law is not followed, the authority which stands in place of the owners consent is wanting. In this case it has been much argued, whether a sale by the Register of Wills, without the aid and presence of the judge is valid; and reliance is placed on that article of the old code, which says that the judge, with the assistance of the register, shall sell the property of vacant estates. If it were necessary to a decision of this cause, it would perhaps be found that this objection is more plausible than solid. But whatever might be our opinion as to the necessity of the

judge of probates of the city of New-Orleans being present and selling the property, with the assistance of the register, we are satisfied that if he is not required to sell, his authority is necessary to enable the Register of Wills to sell. The latter is merely a ministerial officer, and can make no disposition of the property of a succession, unless under the directions of the judge to whom the law intrusts its controul. The old code, page 174, art. 127, says: the judge *shall cause* the property to be sold. In this instance, no order or direction of his to that effect is produced. We consider it indispensable, and it cannot be presumed, for if given at all, it

must have been made a matter of record, and could be produced. It may be properly assimilated to the judgment, and execution, which are a sheriff's authority; and should be governed by the same rules of evidence.

Eastern District,
April 1881.

ELLIOT ET AL.
VS
LA BARRER & AL.

We conclude, therefore, that the plaintiffs must recover the lot sued for; but the case is not before us in a shape to be finally disposed of. By an agreement on record, the rents and profits claimed on one hand, and the demand for the value of improvements, on the other, are reserved until a decision is made on the question of title.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiffs do recover of the defendant the premises sued for, but that the plaintiffs shall not be put in possession until the decision is made on the amount of the rents and profits, and the value of the improvements—the appellee paying the costs of this appeal.

McMASTER vs. BECKWITH.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW ORLEANS.

2L 329
107 69

If a slave be bought as a runaway, and is afterwards employed on a steam boat without permission from the owner, from which he absconds, the owner can only recover the price paid for the slave.

The defendant, master of a steam boat, without permission from the plaintiff, employed his slave on a voyage from New Orleans to Louisville, Kentucky. At the latter place, the slave left the boat and became lost to the owner. Suit was brought, and damages laid at fifteen hundred dollars.

It appeared that the plaintiff bought the slave without guaranty, for the price of four hundred dollars, and that he was a runaway at the time of the sale. His services were shown to be worth from twenty-five to thirty dollars per month.

Eastern District,
April 1831.

M'MASTER
vs.
BECKWITH.

The defendant attempted to show, that the plaintiff had been in the habit of permitting the slave to hire himself and act as his own master. This ground of defence being unsupported by the testimony, the plaintiff had judgment for eight hundred dollars, and the defendant appealed.

Preston, for appellant.

Cenas, for appellee.

Martin, J., delivered the opinion of the court.

The defendant, master of a steam boat, is sued for having taken away the plaintiff's slave, as a hand on board of the defendant's boat, whereby he has been lost to his owner.

The defence, besides the general issue, is that the plaintiff allowed and permitted him to seek employment on board steam boats, going up the river.

There was judgment against the defendant, and he appealed.

The fact of the slave having been taken on board, on a trip to Kentucky, and of his leaving it there, is proven.—It is also shown, that the plaintiff, at times, hired his slave to masters of boats; and gave him, at other times, a written permission to look for employ that way—and we do not believe that the judge erred in concluding that these circumstances did not authorize the defendant to take the slave in his boat, unless an agreement was made with his owner, or a written permission had been produced. There was gross neglect on the part of the defendant; but the plaintiff's conduct had, perhaps, some tendency in leading the defendant into the error he fell in; although the latter cannot be protected under the principles established in the case of *Morgan's syndics vs. Friveash*. We believe the judge erred, in giving damages, besides the value of the slave. Neither was, in our opinion, that value to be fixed in a case in which the plaintiff had acted with prudence. Eight hundred dollars was given for the value of the slave and damages. It is shewn he is

If a slave be bought as a runaway and is afterwards employed on a steam boat without permission from the owner, from which he absconds, the owner can only recover the price paid for the slave.

addicted to running away, and was so when the plaintiff bought him ; under these circumstances, we think his recovery ought not to exceed what he paid for the negro.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of four hundred dollars, with costs, below, and that he pay costs in this court.

Eastern District,
April 1831.

M^r MASTER
vs.
BECKWITH.

VILLALOBOS vs. MOONEY.

APPEAL FROM THE COURT OF THE PARISH OF NEW-
ORLEANS.

A proprietor may cancel at pleasure the contract with an undertaker to build ; but in the exercise of this right, the use of it must be considered as putting an end to the contract in all its parts and relations, and authorizes a valuation of the expense and labour incurred by the undertaker, by other evidence than that of the written contract itself.

The amount stipulated in a contract thus avoided, may be correctly used as a means to ascertain the just value of the work performed, but ought not to be considered in exclusion of all other testimony.

Where architects and undertakers are called upon to estimate the value of work and materials, and differ in their opinions, the lowest estimate will be taken.

Unless there be a contrary stipulation in a contract for building, the materials of an old house removed are, by custom, considered as belonging to the undertaker, as are equivalent for his expense and labour, in removing them.

The facts are fully stated, in the opinion of the court, delivered by

Mathews, J.

This suit was commenced to annul a contract made between the parties, in relation to the erection and completion of a dwelling-house and out buildings. The employer became dissatisfied with the manner in which the undertaker was executing his work ; and availing himself of the article 2736 of the Louisiana Code, claims the right to can-

21	331
49	995
2	331
114	32

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April 1831.

VILLALOBOS
vs
MOONEY.

A proprietor may cancel at pleasure the contract with an undertaker to build—but in the exercise of this right the use of it must be considered as putting an end to the contract in all its parts and relations, and authorises a valuation of the expense and labor incurred by the undertaker, by other evidence than that of the written contract itself.

cel the bargain which he had made with the latter, &c.—

The defendant had executed a large portion of the buildings contracted for, and, during the progress of the work, had received considerable sums of money in payment for his labour. In his answer, he claims, for work done and as damages, an amount greatly exceeding that which he had received, &c. He obtained judgment in the court below for 995 dollars; from which the plaintiff appealed.

The undertaker, by the contract, agreed to complete the whole work for 5800 dollars; during its progress, he received 3900. The proprietor, after cancelling the contract, caused his buildings to be finished by another mechanic, at

an expense of 2800 dollars; and now claims to have refunded to him, by the first architect, the difference between the aggregate of the sums paid by him, say \$6700 and 5800 the sum for which he contracted in the first instance. The first question to be examined arises out of the interpretation which ought to be given to the article of the code on which both parties seem to rely. It grants to the proprietor a right to cancel, at pleasure, the bargain he has made, even in case the work has been already commenced, by paying the undertaker for the expense and labour already incurred, and such damages as the nature of the case may require.

There is something novel in this provision of our law, thus giving a right to one of the parties to a contract, to annul it *ad libitum*. It is perhaps, however, founded in wisdom, considering the uncertainty of titles to real estate in this country, arising from the multifarious tacit mortgages and privileges, established by law, and the formalities required, to render valid, a forced sale under execution, &c. But when a party avails himself of this right, the use of it must be considered as putting an end to the contract in all its parts and relations; and authorizes a valuation of the expense and labour incurred by the undertaker, by other evidence than that of the written contract itself. The

expressions of the law clearly evince an intention in the legislators, that this should be the effect produced by the abrogation of the bargain. And we are unable to see the arguments of counsel, in the same force in which they seemed to operate on their minds, drawn from the probable injustice and faithlessness of undertakers in the execution of their work, whenever they discovered that they had made a bad bargain, in order to compel proprietors to cancel it. There is, perhaps, as much probability that the latter might be induced to make an improper use of their power, when they discovered that they had agreed to pay too much.

The amount stipulated in a contract thus avoided, may be correctly used as a means to ascertain the just value of the work performed; but ought not to be considered in exclusion of all other testimony. The witnesses who were examined in this cause, most of them architects and undertakers by profession, differ materially in their estimates of the value of materials furnished and labour performed by the defendant. It is the interest of such men to value services which they are in the habit of performing, at the highest possible rate; and there is sometimes an *esprit de corps* prevailing among them, formidable to the interest of proprietors, when any collision occurs between the latter and one of their body. Taking these circumstances into view, the truth will, in most cases, be most probably found in the lowest estimate made by any one of them, when called on to value services rendered by men of their art; considered all of characters equally unexceptionable, and uninfluenced by circumstances, having a peculiar tendency to operate more on one than another of them.

A report was made by experts, to whom the valuation of the labour performed by the appellee was submitted; but as this report was set aside, the cause must be decided on other evidences found on the record; and that consists of the written contract between the parties, and the testimony of witnesses above alluded to.

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April 1831.

VILLALOBOS
vs.
MOONEY.

The amount stipulated in a contract, thus avoided, may be correctly used as a means to ascertain the just value of the work performed—but ought not to be considered in exclusion of all other testimony.

Where architects and undertakers are called upon to estimate the value of work and materials, and differ in their opinions, the lowest estimate will be taken.

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vs.
MOONEY.

The contract we have seen estimated the whole value of materials and labour, necessary to complete the buildings, at 5,800 dollars, of which 3,900 were paid to the undertaker before he was discharged from the work ; and the proprietor, afterwards, paid 2,800 to another person to finish the works. A Coursel, a mechanic and one of the witnesses, put a lower estimate on the expense and labour of the defendant, than any other who testified in the cause; it is more in conformity with that made by the parties to the contract, in their written agreement, than the valuation made by other witnesses. We do, therefore, adopt it as the basis of our judgment ; and, we believe, with the utmost propriety, considering that the appellee was discharged from his undertaking, in consequence of errors and defects in his work, allowing to him 4350 dollars for his work, good and bad, as stated by the witness. From that sum must be taken 3900 dollars paid by the plaintiff, which leaves a balance in favor of the former, of 450 dollars. In this calculation, we do not take into consideration the value of the materials of the old house which was removed from the lot by the undertaker, before the new buildings were commenced. For the evidence shews that unless there be a contrary stipulation in the contract for building, the materials of an old house removed, are, by custom, considered as belonging to the undertaker as an equivalent for his expense and labour in removing them ; and this we consider as not unreasonable, as they are generally of but little value.

Unless there be a contrary stipulation in a contract for building, the materials of an old house removed are by custom considered as belonging to the undertaker, as an equivalent for his expense and labor in removing them.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be annulled, avoided and reversed ; and it is further ordered, that the appellee do recover from the appellant four hundred and fifty dollars ; the former to pay the costs of this appeal, and the latter those of the court below.

*DISMUKES ET AL. vs. MUSGROVE.*Eastern District,
April 1831APPEAL FROM THE COURT OF THE EIGHTH DISTRICT,
THE JUDGE THEREOF PRESIDING.DISMUKES & AL.
vs.
MUSGROVE.

If the plaintiffs claims through a deed made to the trustee, he is not a third party, to them, in relation to any proceedings, which may have taken place in respect to the property he held in that capacity.

Where the certificate is signed by a person who styles himself Judge of Probates, he will be presumed to be the sole Judge of the court.

A record ought not to be rejected because different parts of it may have been obtained from the clerk at different times, where the certificate shows that the record of the whole proceedings is complete.

A donation disguised under the form of a stipulation, *pour autrui*, is revocable by the donor until accepted, and there are no exceptions in favor of minors.

This was an action to recover from the defendant certain slaves, and the facts are substantially as follow :

On the 20th April, 1811, Ephraim Dismukes, father of the plaintiff's, made a deed of sale, to Champness Terry, of the slaves in controversy. On the 5th November, 1811, Terry made a counter letter, by which he agreed to hold said slaves, in trust, for the plaintiffs, (then minor children of Ephraim Dismukes) until they became of age or were married.

Subsequently, however, Ephraim Dismukes commenced a suit in the court of Chancery, in the State of Mississippi, alleging fraud in the sale, and obtained a decree annulling the sale, and directing restitution of the slaves or the payment of their value. Ephraim Dismukes assigned this decree to Andrew Dismukes, who entered into a *transaction* with defendant; received compensation and assigned the title of the slaves to her. The defendant also claimed under a probate sale of the estate of Champness Terry. The only points raised by the plaintiff, were, that the stipulations contained in the counter letter, were stipulations *pour autrui*. That they operated at once to the benefit of plaintiffs, and that Ephraim Dismukes could not afterwards revoke them by any act of his.

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DISMUKES & AL.
vs.
MUSCHROVE.

A bill of exceptions, to the introduction of certain evidence, is given at large in the opinion of the court.

There was judgment for the defendant, and the plaintiffs appealed.

Hennen, for appellants.

Ripley, for appellee.

Porter, J., delivered the opinion of the court.

This cause has been twice before the court, and now returns here again, after judgment in favor of the defendant. A statement of the case, the pleadings, and the incidents of the cause, previous to an examination of the merits, will be found in the seventh volume of *N. S.*, page 58. On each trial below, there has been a verdict and a judgment against the plaintiffs.—*Vol. 7. N. S. 58—id. vol. 8, 375.*

On the first trials, a great number of bills of exceptions were taken to the opinion of the judges admitting and rejecting evidence. The record, now before us, presents some questions arising in a similar way; and they must be disposed of, before the case can be examined on its merits.

A record of certain judicial proceedings in the state of Mississippi, in relation to the estate of the trustee, Terry, was offered in evidence, on the part of the defendant. In different parts of this record, there are distinct certificates of the register of the orphan's court, that the matters and things therein set forth, are true copies; and these certificates are followed, in one instance, by that of a person styling himself *judge of probates*; and in another, by one who states, that he is associate judge of the court of probates: that the person who gives the certificates is register, and that the copies were made and certified in due form of law.

At the close of the record, the following certificates are found:

"I, Willis H. Arnold, register of the orphan's court, and clerk of the probate court of the county aforesaid, do certi-

fy, that the foregoing is a true copy from the record of said court, of all the proceedings had in said courts, so far as the same has been recorded, in relation to the estate of Champness Terry, deceased."

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The signature and attestation follows, and the following certificate is subjoined :

"State of Mississippi, Hancock county.

"I, Noel Jourdan, judge of probates for the county aforesaid, do hereby certify, that Willis H. Arnold, whose name appears signed to the foregoing certificates, was, at the time of signing the same, and still is, the legal clerk of the probate court, and the register of the orphans court of Hancock county aforesaid, and that the said certificates and copies are made out and certified in due form of law."

The objections to the introduction of the record were placed, in the court below, on four grounds :

1. Because the proceedings were *inter alias acta* ; that is to say, between third persons.

2. Because it does not appear that the certificate of the judge, certifying to the attestation of the clerk, is the certificate of the presiding judge, as required by law.

3. Because the proceedings, in said record, shew that they took place before different tribunals, and different judges, with different certificates.

4. Because the different documents, embodied in said record, are many of them distinct and separate proceedings, with certificates, shewing the want of unity in the record.

I. The first ground we think untenable. The deceased Terry, was the trustee of the plaintiffs. Their father brought an action against him to have the deed rescinded, and the property conveyed by it redelivered. The judgment condemned Terry to do so, or pay a certain sum of money. The defendant sets up a claim as assignee of that judgment ; and further asserts, that she holds the property under a sale made by the court of probates of the State of Mississippi.

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If the plaintiffs claim through a deed made to the trustee, he is not a third party to them in relation to any proceedings which may have taken place in respect to the property he held in that capacity.

Where the certificate is signed by a person who styles himself Judge of Probate, he will be presumed to be the sole judge of the court.

The records offered were legal evidence to sustain that allegation : whether they conveyed to her a good title, was another question.

The plaintiffs claim through a deed made to the trustee, and he is, therefore, not a third party, to them, in relation to any proceedings which may have taken place in respect to the property he held in that capacity. What effect these proceedings could have, or had, on their rights, we will examine hereafter, when we come to a consideration of the merits.

II. The certificate purports to be given by a person who signs himself judge of probates. The act of Congress requires a certificate from the judge, chief justice, or presiding justice, as the case may be. This enactment contemplates, that where the court is composed of one judge, he shall sign as judge, without any addition ; but where it is composed of more than one, he shall distinguish and shew that he is chief justice, or presiding magistrate. When the attestation comes from one who styles himself *judge*, it is not necessary he should add, he is the sole judge, or that there are no others than himself who constitute the court. He would not be judge of the court, but one of the judges of it, if there were more than himself. In the case of *Scott vs. Blanchard*, we admitted the record on the certificate of a person styling himself chancellor, without any addition that he was the only person who presided in the tribunal from which the record professed to come ; though in some of our sister states it is not uncommon for their courts of that description to be composed of more than one chancellor.—8 N. S. 303.

The case to which we are referred in 2d N. S., is not that before the court. The observations contained in the opinion must be taken with reference to the facts there presented for decision. The judge, in that instance, certified he was judge of a certain district, and did not say he was judge of the court from which the record was taken.

It has, however, been contended, that by looking into the record, it is seen that the court is composed of more than one judge. This fact is deduced from a certificate given by one of the associate judges to a part of the record, as has been already stated, which has a distinct certificate of the clerk. That certificate was given three years previous to that on which the record was offered and admitted in the court below. The presumption, we think must be, that the organization of the court was changed in the mean time. But if we go beyond the certificate, on which the law says the record shall be legal evidence, we see, also, that the person who signs the certificate as judge, was previous thereto, chief justice, and not one of the associate judges. So that whether we take it under the certificate, or by the evidence offered to impair its validity, there is no ground to refuse faith and credit to the record.

III. How the record came to be made up of what was originally distinct copies, containing separate certificates, we do not know. It is, certainly, an unusual mode of bringing the proceedings of one court, before another, in evidence. It most, probably, arose from the party having obtained copies, of separate portions of the record, at different times; and having carried these copies to the clerk, when he wanted a full and complete transcript. The latter, to save time, or from some other cause, added to them the subsequent proceedings, in the settlement of the estate. But be the cause what it may, of the record taking this shape, there is nothing in the facts just stated, which would authorize us to reject it. The clerk certifies that the transcript contains a copy of all the proceedings; and whether that transcript was made out at one, or at different times; or whether it contains one or more certificates, the faith and credit due to it, under the act of Congress, is not impaired.

We discover nothing to sustain the objection, on the ground that the record is of proceedings in different courts.—

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DISMUKES & AL
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A record ought not to be rejected because different parts of it may have been obtain'd from the clerk at different times, where the certificate shows that the record of the whole proceedings is complete.

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HODGSON ET AL
vs.

MISSIS. INS. CO,

Mathews, J., delivered the opinion of the court.

This is an action on a policy of insurance of freight, valued at 5000 dollars. Judgment was rendered against the plaintiffs in the court below, from which they appealed.

The insurance was made on the brig *Naiad*, at and from New-Orleans to Mobile, and at and from Mobile to Liverpool. The vessel sailed from the first mentioned port in ballast, and was lost previous to her arrival at the second. She sailed under charter party.

The liability of the insurers to indemnify the claimants for the loss sustained, is resisted on two grounds: first, that they had no insurable interest at the time, when the accidents occurred, which occasioned the loss: 2d, that if they had such interest, it depended solely on the charter-party, which was concealed from or not disclosed to the insurers, when application was made to them to assume the risk.

Where a vessel sails under charter party, the owners have an insurable interest in freight.

It is clear, from the authorities cited, that, had the brig sailed from New-Orleans without charter party and without any cargo, the evidence of the case shews the loss to have occurred at such a time, and in such a manner, as to exonerate the underwriters from all responsibility for freight. It is equally clear, from the same authorities, that in sailing under a charter party, the owners had an insurable interest in freight, commencing at the time the vessel left New-Orleans; which renders the insurers liable to pay the whole amount stipulated in the policy as valued therein.—See *Phillips on Insurance*, from page 51 to 54; and *3d Kent's Commentaries*, p. 118, and the cases cited by these authors.

The failure of the insured to communicate to the insurers, the knowledge of the fact that the vessel was under charter party, is not such a concealment as will annul the policy.

This view of the case dispenses with all other considerations, except those which relate to the failure on the part of the insured, to communicate to the insurers the circumstance of the brig sailing under charter party. Is this such a concealment or failure to disclose a fact so materially affecting the risk assumed, as to annul the policy? We think not. It is the duty of persons wishing to obtain in-

surance, to make a faithful representation of all facts supposed to be particularly within their knowledge, which might have an effect on the contract, by increasing the risk to be taken by the insurers; and a suppression or concealment of such facts, whether through negligence or design, will generally avoid a policy. Freight *lato sensu*, means either compensation for the use of a ship; or compensation for the transportation of merchandise. An insurance effected on freight *eo nomine*, embraces either kind. The first species is generally created by a contract of charter party; and so soon as the vessel breaks ground, its hire is at risk, and constitutes a legal subject of insurance. The right to the secured commences only when the goods are put on board, &c.—*Phillips Ins. p. 52.*

In the present case, the insurance was made on freight at and from New-Orleans to Mobile, and at and from the latter place to Liverpool. If cargo had been put on board at the first port *a quo*, the underwriters would be most clearly liable under their contract, and the risk would have been equally as great, if not greater, than that which occurred by the circumstance of the brig sailing in ballast from New-Orleans to Mobile; where, according to the charter party, cotton was to have been taken in to be transported to Liverpool. If, then, they were willing to insure freight on the whole voyage, as stated to them in the application for insurance at one and a half *per cent.*, it cannot be supposed that they would have required a greater premium, had the fact been communicated, that the cargo was to be taken in at Mobile. The course of the voyage to be insured, was sufficient in itself, to have put them on inquiry as to the place where the vessel was to be loaded. The knowledge or information material for the insurer to know, and necessary to be communicated to him, when the contract is made, is a question of fact, and the materiality of the information is to be determined under a consideration of all the circump-

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HODGSON ET AL
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The knowledge or information material for the insurer to know and necessary to be communicated to him when the contract is made, is a question of fact, and the materiality of the informa-

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tion is to be deter-
mined under a
consideration of all
the circumstances
which belong to
the case.

stances which belong to the case,—3 *Kent's Com.* p. 232.—
Now, in addition to the circumstances already stated, which
lead us to the conclusion that the fact of the vessel sailing
under charter party, if it had been communicated, would
not have prevented the insurers from making the contract
which they did. We have the testimony of several clerks
or secretaries of insurance companies that, in their opinion,
this fact would not have been considered as a circumstance
calculated to increase the risk, and, consequently, could not
have afforded ground for an increased premium. If we add
further, the known frequency of vessels sailing under charter
parties, no doubt can remain, that there was not an indispen-
sible obligation on the part of the applicants for insurance, in
the present instance, to communicate their charter party to
the insurers. In other words, the neglect to make such
a communication does not amount to a legal fraud, sufficient
to avoid the policy.

It is, therefore, ordered, &c. that the judgment of the
District Court be avoided, reversed and annulled; and it is
further ordered, adjudged and decreed, that the plaintiffs
and appellants do recover from the defendants and appellees
the sum of five thousand dollars, with interest at the rate of
five *per cent. per annum*, from the judicial demand, with
costs in both courts.

MAYOR ET AL vs. RIPLEY ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The act of 1825, declaring it not to be good cause of challenge to a juror
that he was a member of the corporation that was a party in the cause, is
not repealed by the provisions of the Code of Practice,

An act of the legislature, the execution of which is suspended by one of
its clauses, or by a delay of its promulgation, may, in the meanwhile, be
modified or repealed by a posterior act.

The defendants objected to the swearing of the jury, on
the ground that they were inhabitants of the city of New-

Orleans, and members of the corporation. The court *a quo*, sustained the objection, and the plaintiffs appealed.

Moreau and De Armas, for appellants.

Hennen, for appellees.

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RIPLEY ET AL.

Porter, J., delivered the opinion of the court,

The jurors called to try the case were challenged by the defendants, on the ground that they were members of the corporation. The court sustained the objection; and the plaintiffs appealed.

The legislature had provided for the interest which persons, so circumstanced, might have in cases of this description. By the act of January, 1825, it was declared not to be a good cause of challenge to a juror, that he was a member of the corporation that was a party in the cause. The Code of Practice, however, contains a contrary provision by its 507th article. The competent juror is he who has neither an interest, direct or indirect, in the cause.

The judge of the court of the first instance, was of opinion, that the provisions of the Code of Practice, repealed the act of 1825; and that opinion were doubtless correct, if the Code of Practice had been passed after the act alluded to. But it escaped the judges attention, that the code received legislative sanction on the 12th April, 1824, nearly one year previous to the act of 1825. It is true, the code was not promulgated until the autumn of 1825. But there cannot be a doubt, as has already been decided by this court, "that an act of the legislature, the execution of which is suspended by one of its clauses, or by a delay of its promulgation, may, in the mean while, be modified or repealed by a posterior act.—7 N. S. 469.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the case be remanded to the District Court, with direc-

The act of 1825 declaring it not to be good cause for challenge to a juror that he was a member of the corporation that was a party in the cause, is not repealed by the provisions of the Code of Practice.

An act of the legislature, the execution of which is suspended by one of its clauses, or by a delay of its promulgation, may, in the meanwhile, be modified or repealed by a posterior act.

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tions to the judge not to reject the jurors called to try the same, on the ground that they are inhabitants of New Orleans, paying taxes for their property therein. And it is further ordered, that the appellees pay the costs of this appeal.

RACHEMANN vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW ORLEANS.

Where the judge *a quo*, has made a statement of facts, it is not required to show that any attempt was made to have one made between the parties. The Supreme Court will presume that the judge has done his duty, and did not volunteer in making a statement, till it was his duty to do so.

The syndic of an insolvent cannot, on a mere motion, be made liable *de bonis propriis*.

Where there is a statement of facts, the cause is examinable in every one of its parts without exception.

A creditor of the insolvent, took a rule upon the syndic, to shew cause, why he should not, within a given time, file a tableau of distribution, or be condemned to pay the amount of the claim. Service of the rule was made upon the syndic, who not answering, the rule was made absolute for the payment of the claim; and the syndic appealed.

The record was certified by the judge, to contain all the matters of fact upon which the case was tried.

Hoffman, for appellee, prayed the dismissal of the appeal, on the ground, that it was not brought up conformably to law.

Martin, J., delivered the opinion of the court.

The syndic, in this case, having neglected to file a tableau of distribution, Shamburgh, one of the creditors, obtained a rule on him, to shew cause why he should not, within a fortnight, file a tableau, or be decreed to pay the appellant's claim.

The rule was served: the syndic took no notice of it. The

rule was made absolute for the payment of the claim; and he appealed.

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The appellee has prayed for the dismissal of the appeal, on the ground, that there was no statement of facts.

BACHEMAIN
vs.
HIS CREDITORS.

The judge has certified, that the record contained all the matters of facts on which the cause was tried.

It has been urged, that the appellant does not appear to have made any attempt to have a statement of facts agreed upon with the appellee or his counsel; and there appears no facts on the record, neither has the case been tried on any documents.

We are not aware that it was ever, in any case before us, required, where the judge *a quo* has made a statement of facts, to prove a vain effort of the appellants, at having one made between the parties. We presume the judge has done his duty, and did not volunteer in making a statement till it became his duty to do so.

Where the judge *a quo* has made a statement of facts, it is not required to show that any attempt was made to have one made between the parties. The supreme court will presume that the judge has done his duty, and did not volunteer in making a statement until it was his duty to do so.

We are ignorant of any better way the judge has to state the facts, in a case like the present than by a reference to the record, and his certificate that no fact is therein omitted. We think the appeal ought to be sustained.

On the merits. It is clear, the remedy against the syndic was mistaken. He could not, on a mere motion, be made liable *de bonis propriis*.

The syndic of an insolvent cannot on a mere motion, be made liable *de bonis propriis*.

The appellant's has urged, that we cannot correct the error of the first judge, because there is no assignment of error.

There is a statement of facts, and in such a case, the case is before us examinable in every one of its parts without exception.

Where there is a statement of facts the cause is examinable in all parts without exception.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; the cause remaned it for further proceedings, and that the appellee pay costs in both courts.

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April 1831.

GALE
vs
QUICK'S BAIL

GALE vs. QUICK'S BAIL.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.

It cannot be considered an *incident in the cause*, after judgment is rendered against the defendant, to call in another party for the purpose of obtaining judgment against him. It is, on the contrary, the commencement of a new suit against the surety, growing out of the proceedings against the principal which have terminated in judgment and execution.

A trial by jury cannot be refused on the ground that the suit commenced by motion instead of petition.

The bail has a right to file an answer and have his case tried by a jury.

On a motion to enter up judgment against the defendant's bail, the latter filed an answer and prayed a trial by jury. The court *a quo* refused to receive the answer, and gave judgment for the plaintiff, from which the bail appealed.

Conrad, for appellant.

1. The proceedings against bail are to be tried summarily and without the intervention of a jury.—*C. P. art. 235.*

Preston, contra.

The bail was entitled to a jury. He might have wished to show non-age when the bond was signed, or that the original defendant was dead.—*Labarre vs. Fry—9th Martin's Rep. 381.*

Porter, J., delivered the opinion of the court.

The plaintiff recovered judgment against the defendant, and issued a *fieri facias*, and *capias*, to enforce it. The sheriff returned *nulla bona* on the first; and, on the second, stated that the defendant could not be found; whereupon a motion was made, that judgment should be rendered against the appellant, as bail of defendant.

To the notice served of this intended motion, the appellant appeared, and offered an answer, in which he denied he was bail, and prayed for a trial by jury.

The court refused to admit the answer; upon which the appellant demanded a trial by the court. The judge refused a trial, and ordered judgment to be entered up in favour of the plaintiff. From that judgment this appeal is taken.

If this proceeding be correct, then it follows, it is sufficient for one party to allege, and the other shall be condemned. And it also follows, that the notice which the law requires to be given to the party against whom judgment is sought, would be a useless, and worse than useless, a burthensome ceremony. He would be required to attend, and forbidden to make any defence when he did attend.

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The appellee contends the court did not err, because the Code of Practice provides, that if the bail does not present the body of the defendant, judgment shall be rendered against him, on motion, after ten days notice, on the production of the bail bond.—*Code of Practice*, 235.

And he further urges, that by the provisions of the same work, certain cases are to be tried summarily without the intervention of a jury; and the present is one of those contemplated by these provisions, it being *an incident in the cause*.—*Code of Practice*, 755, 757.

It cannot be considered *an incident in the cause*, after judgment is rendered against the defendant, to call in another party, for the purpose of obtaining judgment against him. It is, on the contrary, the commencement of a new suit against the surety, growing out of the proceedings against the principal, which have terminated in judgment and execution. There is no other ground to justify us bringing this case within the provisions of the Code of Practice, in regard to summary trials, and refusing a jury, except the suit commencing by motion, instead of petition; and this, in our opinion, is not sufficient. The law has not said so, and this mode of trial should not be extended by implication. The legislature *may*, under our constitution, refuse to parties the benefit of a trial by jury, in civil cases. But courts cannot presume they intend to do so, unless the directions are clear, or the necessity so cogent, that their intention is manifest; for the utility of this mode of investigating facts is great, and the institution justly dear to the citizen. Previous to the

It cannot be considered *an incident in the cause* after judgment is rendered against the defendant, to call in another party for the purpose of obtaining judgment against him. It is on the contrary, the commencement of a new suit against the surety growing out of the proceedings against the principal which have terminat'd in judgment and execution.

A trial by jury cannot be refused on the ground that the suit commenced by motion instead of petition.

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The bail has a
right to file an
answer, and have his
case tried by a jury

Code of Practice, our law sanctioned proceedings against bail by motion. The case of *Labarre vs. Fry's bail*, arose under it, and presented the same questions with that now before us. We were of opinion there, that the bail had a right to file an answer, and have his case tried by a jury. The reasons which then influenced us, retain their full force on our minds. The defence of the bail may present questions of fact, difficult to decide; the testimony may be conflicting—the weight due to it uncertain. He may allege the instrument was forged—he may deny he was the person who signed it—he may plead minority—he may shew payment—he may aver a surrender of the debtor, and allege an escape. Why, in such matters, he should not have a full defence, and the benefit of a jury trial, we cannot see; and consequently we cannot presume the legislature intended he should be deprived of them.—9, *Martin*, 381.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be removed to the said court, with directions to the judge to permit the defendant to file the answer presented by him: and it is further ordered that the appellee do pay the costs of this appeal.

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SCHROEDER'S SYNDICS vs. NICHOLSON.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

By the laws of Louisiana, where an insolvent debtor makes a cession of his goods to his creditors and they accept it, there is a transfer of the property; and a judgment obtained in a court of the U. States, posterior to that transfer, cannot affect the property ceded. The State has a right to regulate property within her limits, and to say how, when, and on what conditions, it shall cease to belong to one person and be transferred to another.

The *cessio bonorum* of the insolvents was accepted on the 11th December, 1829. At a meeting of the creditors, legally convoked, on the 19th January following, syndics were appointed; the proceedings before the Notary returned into

court, and homologated on the 29th January, 1830. Pending these proceedings, to-wit: on the 19th January, 1830, suit was commenced against the insolvents, in the District Court of the United States, for the Eastern District of Louisiana, by C. and J. D. Wolf, citizens of the State of New York, and judgment rendered in their favor on the 30th of the same month. On the 1st February, execution issued, and the goods ceded by the insolvents, were levied on by the marshal, and subsequently sold for the sum of six hundred and sixty-nine dollars eighty-four cents. Between the seizure and sale of the goods, a motion was made, in the court of the United States, in behalf of the defendants and their syndics, to have the execution set aside and the property released from the seizure. The court, after argument, took the case under advisement, and discharged the rule.

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April 1831.

SCHROEDER'S
SYNDICS
vs.
NICHOLSON.

This suit was brought to recover damages from the marshal, who set up in defence:—1st. The authority of the writ of execution from the court of the United States: and, 2d. the discharge of the rule to set aside the execution, which he averred had the force of *res judicata*.

There was a verdict and judgment for the plaintiffs in the court below, and the defendant appealed.

Slidell and *Maybin*, for appellant.

Grymes, for appellee.

Porter, J., delivered the opinion of the court.

The insolvents made a surrender of their property, to their creditors, under the laws of this State, on the 11th December, 1829. On the same day, the cession was accepted by the judge. On the 19th January, of the following year, a meeting of the creditors was called before a Notary, who assented to the prayer of the petitioners; accepted the cession of their goods and effects, and appointed syndics. On the 29th of this month, the proceedings of

Eastern District, the creditors were returned into court, and by its judgment
April 1831. expressly homologated.

SCHROEDER'S
 SYNDICS
 vs.
 NICHOLSON.

Between the period of filing this petition for a surrender and that of the homologation by the court, of the act of the creditors acceding to it, suit was commenced in the District Court of the United States, for the Eastern District of Louisiana, and judgment obtained against the insolvents, upon their confession of debt. On the first day of February, execution issued from this court; and, two days after, the marshal levied under it, and seized a portion of the merchandise which the insolvents had already transferred to their syndics. On the 8th, of the same month, he made a further levy; and on the 25th, sold the goods, so seized, for the sum of six hundred and sixty-nine dollars eighty-four cents.

After the seizure, and before the sale, a motion was made, in the court of the United States, by the defendants, and the syndics who are now plaintiffs before this court, to have the execution set aside, and the goods levied on, discharged from the seizure. The court, after hearing argument, and taking the case under advisement, discharged the rule.


This action is brought to recover damages from the marshal for these alleged illegal acts. He pleads in defence, the authority of the writ of execution issued from the court of the United States, and the discharge of the rule to set aside the execution; which, he avers, has the force of *res judicata*.

The last ground of defence must be first considered, for if sustainable, it precludes any examination of the merits.

A good deal was said, in the argument here, as to what was really put at issue, and decided in the court of the United States. Counsel have differed very much in their statements; and, it is obvious, we must decide on the record, and nothing else. On examining it, we find that no grounds are assigned for the rule; and no reasons are given by the

court for discharging it. We are left to conjecture, for nothing is proved. It is said, the syndics could not have appeared in that court, unless on a claim of property. This is a mistake. By the 396 article of the Code of Practice, a third person may file opposition to an execution, on two grounds:—one, that he is the owner of, the other, that he has a privilege on, the thing seized. In which light the plaintiffs appeared here, we cannot say; and the authority of the thing judged, takes place only with respect to what was the object of the judgment. Again, by our law, which we understand furnishes the rules of proceeding in the court of the United States, for Louisiana, it is a matter of very great doubt, indeed, whether a third party, on a claim of property, can have an execution set aside, otherwise than by a petition. The 398 article of the Code of Practice, is express to that effect. We do not know but it was on that ground the motion was dismissed; and if it were not, it is very questionable whether the refusal, by the court to enjoin in a case like this, can form a bar to a claim for damages. The code seems to consider this application an accessory to the investigation of the merits, which is to be made in a suit brought for that purpose. But without expressing any decided opinion on this point, we are clear that there is no satisfactory proof before us, that the question raised in this cause, was decided by the court of the United States; and we cannot presume it. Entertaining, as we do, an opinion entirely adverse to the correctness and legality of the defendant's conduct, we cannot suppose that the learned person who presides in that court, could have decided, such conduct was conformable to law.—*Code of Practice* 398, 399, 400 and 401. *Ingersoll's Digest*, Ed. 1825, 140.—5 *Martin*, O. S. 214.

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Authorities have been read to us in order to establish, that the officer is protected by the writ, and cannot be affected by the irregularities of the judgment. This is true. But no

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By the laws of Louisiana, where an insolvent debtor makes a cession of his goods to his creditors and they accept it, there is a transfer of the property, and a judgment obtained in a court of the United States posterior to that transfer, cannot affect the property ceded. The state has a right to regulate property within her limits, and to say how, when, and on what conditions, it shall cease to belong to one person and be transferred to another.

authority could sanction his taking the property of B, under an execution against A; and that we understand to be the question before the court.

By the laws of Louisiana, where an insolvent debtor makes a cession of his goods to his creditors, and they accept it, there is a transfer of his property;—it ceases to be his and becomes theirs. We are unable to distinguish between this change of ownership, and any other which may be made under the laws of the state, by the common forms of alienation. And if a judgment, obtained in a court of the United States, posterior to that transfer, can reach back and avoid it, it must have the same power with regard to every other conveyance. This principle appears to us to strike at the sovereignty of the state, on a matter of the most vital importance to her, and in relation to which we did not suppose her supremacy was doubted. She certainly has a right to regulate property within her limits, and to say how, when, and on what conditions, it shall cease to belong to one person, and be transferred to another.

The decision of the majority of the court in the case of *Ogden vs. Saunders*, has been relied on, in order to shew that a discharge under the insolvent laws of a state, cannot be pleaded in bar to a suit by a creditor who is a citizen of another state. That decision may be admitted to its full extent, without impugning the principles we have just laid down. The authority of a state to discharge its citizen from legal proceedings against him, by a creditor who was never subject to its laws, either in his person, or by his contract, may be conceded, without at all affecting its right over property within its jurisdiction, and which it has power to regulate and controul. The judge who delivered the opinion of the majority of the court in that case, in illustrating his argument, says, a discharge under state insolvent laws, could not prevent the execution of a *capias ad satisfaciendum*, which issued from an United States' court. If

he, or those whose opinions he expressed, had thought these laws could not withdraw property which had been already transferred under them, from the operation of a *fieri facias* issuing from the same court, we presume he would not have omitted so striking an illustration. The distinction between the case put by the supreme court and that now before this court, appears to us obvious. Neither state insolvent laws, nor any other law of a state, can interfere with an execution of the courts of the United States, against the person or property of a debtor, so long as that property is his, or the debtor exists, unless in those cases where by process from the state courts, their execution may have obtained a precedence. But state laws may have provided for certain modes of alienating property before the execution issues from the federal court; and if the property belongs to another, at the time the writ comes into the marshal's hands, there is no more reason for giving it effect on that property, than there would be to give a *capias* effect on the body of a debtor who had previously been condemned to capital punishment under a state law. In both the one, and the other instance, there is nothing for the execution to act on.


The doctrine under which this act of the marshal is justified, seems to us to lead to the most alarming consequences. The suit in *concurso* is a remedy provided by state laws, to enable creditors to enforce their claims against a debtor. Its constitutionality, so far as it affects creditors, citizens of this state, cannot be questioned. This has been settled by the highest authority.

If then the proceedings, in the exercise of this remedy, have proceeded so far as to produce a change of property, and they are not of sufficient force to prevent a levy under a writ of execution from the United States courts, the same consequence must follow when a judgment of these courts, given in an ordinary case at the suit of a single creditor, is about to be carried into effect. The writs of execution

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from the tribunals of the United States will, in all cases, take precedence, and have a preference, over those of our state. The sheriff must surrender the property seized to the marshal; and the foreign creditor be paid in preference to the domestic creditor. We have looked in vain for any thing in the constitution of the United States, which gives this advantage to a citizen of another state, or a foreigner, over our own citizens; and which makes right depend, not on the contract, or the law of the contract, but on the tribunal where the remedy is sought.

Again, when is the right of preference to cease? If a change of property does not terminate it, what will? If it exist at all, it must have its source in a supposed right to the property of a debtor which a foreign creditor enjoys, and of which he cannot be divested by executions from state courts, or by transfers made under the laws of the country where the property is situated. If it be of that rigorous nature, it will follow the property into any hands it may come. Sales by syndics, or under an execution from a state court, will not affect it. Strange as this may appear, and absurd as is the consequence, yet there is not a single reason which can be given to invalidate the transaction before the court, that would not destroy any other alienation made under the laws of the state. The *concurso* is a remedy she gives her own citizens to enforce their claims against a debtor; and if that remedy does not assure to them the property they acquire under it, in case there is a foreign creditor, all her remedial laws are a mockery, and worse than a mockery.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs,

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The deliberations of creditors need not be homologated.

The charge of fraud against an insolvent must be made on the written depositions of a creditor, stating specially the acts of fraud.

If the creditors refuse a discharge, the judge cannot grant one

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At a meeting of the insolvent's creditors, all who appeared (with the exception of one) made a declaration that the schedule exhibited evidences of fraud. They appointed a syndic, and refused the discharge. No opposition being made, the proceedings were homologated, upon motion, and the insolvent discharged from the payment of his debts. The creditors appealed.

Conrad, for appellant.

1. The decree of homologation was irregular and premature; the requisite formalities not having been complied with, and there being charges of fraud against the insolvent.

2. The court erred in granting a discharge to the petitioning creditor.

Martin, J., delivered the opinion of the court.

The insolvent filed his petition; the judge accepted the cession of his goods, and a meeting of his creditors took place before a notary, at which all the creditors, who appeared, except the insolvent's wife, alleged that the schedule exhibited strong evidences of fraud, and refused to grant him a discharge; the wife made no allegation of fraud, but insisted on all her rights, privileges, and mortgages; but did not speak of a discharge.

No opposition was made to the proceedings before the notary; the District Court homologated them, confirmed the nomination of the syndic, and discharged the debtor from the payment of his debts, according to law.

Several of the creditors appealed, whose counsel has urged that the homologation was irregular and premature. The regular formalities not having been complied with;

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The deliberations of creditors need not be homologated.

The charge of fraud against an insolvent must be made on the written depositions of a creditor stating specially the acts of fraud.

If the creditors refuse a discharge the judge cannot grant one.

and there being charges of fraud, and the court erred in discharging the debtor.

The act of 1817, 2 Moreau's Digest, 429, sec. 17, has declared that it shall no longer be necessary to have the deliberations of creditors (in a case like the present) homologated—it is clear nothing required or authorized the homologation. The appointment of the syndic might have been opposed in court, within ten days after the meeting of the creditors; after the expiration of that delay, an opposition would have been too late; and it appears fifteen or sixteen days had elapsed when the confirmation took place.

It is true the creditors alleged that the insolvent's failure exhibited strong evidence of fraud; but the law allows the opposition to the surrender of goods, on the written *depositions* of a creditor, stating specially the several facts of fraud, being alleged against the debtor—*id. sec. 18*. The District Court, therefore, did not err in regarding the unsworn and general allegations of the creditors, at their meeting; but he, in our opinion, erred, in discharging the insolvent from the *payment* of his debts.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and preceeding to give here such a judgment as, in our opinion, ought to have been given below; it is ordered, adjudged and decreed, that the insolvent be relieved and discharged from every imprisonment for any debts contracted before the surrender, and from every judicial proceeding relative to the same, except in case he should thereafter acquire other property.

The costs of the appeal below to be paid by the estate.

DAUNOIS vs. LEEDS

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

If, owing to irregularities in the proceedings, a public sale be illegal, the purchaser must return the property, for he cannot hold it under a sale which

is null and void. If, on the contrary, the sale be perfect, he must pay the price and cannot keep both the property and the price he was to pay for it. Eastern District. April 1831.

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The defendant, at a public sale made by the plaintiff, as city marshal of New-Orleans, became the purchaser of a slave, and refused to pay the price or redeliver the property. This suit was brought to recover the price, or compel the defendant to restore the slave.

The defendant set up the following grounds of defence :

1. That the marshal was without authority to sell, as the City Court had no jurisdiction or right to issue process against real estate or slaves.

2. That the formalities required by law for the sale of slaves, were not complied with.

3. That the slave was the property of one Crocket, by whom he had just reason to fear he should be disquieted.

Crocket intervened in the suit and took out a commission to prove title to the slave, which was not returned. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Lockett, for appellant.

1. The marshal has no authority to sell *real property*, under the laws creating the City Court.—1, *Moreau's Dig.* p. 347.—The judges of the City Court are only invested with the same powers that justices of the peace had, and they possessed no authority to seize or sell real property.—*C. P. art.* 1144, 1146, 1147. The act creating the court gives the judges power to determine *all suits except of a real nature*.

2. The marshal gave no notice of the seizure as required by law, nor was the sale advertised by being posted up at the church and court-house door.—*C. P. art.* 654, 668.—8 *Martin, N. S.* p. 246.

3. The defendant had just reasons that he would be sued and disquieted in his possession from the intervention of

Eastern District of New York, *Crocket*, and had a right to refuse the price.—*C. C. art. April 1881. 2535, 2595.*

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4. The law expressly allows purchasers to retain the price in cases similar to the present.—*C. P. art. 710.*

Roselius, contra :

1. The City Court has authority to issue process to seize and sell immoveable property, to testify its judgments; but whether it has or not, the defendant cannot keep the slave and the price at the same time.

Porter, J., delivered the opinion of the court.

The defendant who purchased a slave at a public sale, made by the plaintiff, marshal of the City Court, refused to pay the price, or redeliver the property to the petitioner.

He is now sued for the price of the adjudication, with interest and costs; or to restore the slave and pay hire for him. His answer sets up various irregularities in the proceedings by which, as he contends, the sale was null and void.

If owing to irregularities in the proceedings, a public sale be illegal, the purchaser must return the property, for he cannot hold it under a sale which is null and void. If, on the contrary, the sale be perfect he must pay the price and cannot keep both the property and the price he was to pay for it.

If this defence be sustained by the facts, the defendant must return the slave, for he cannot hold him under a sale which was void. If, on the contrary, the facts do not sustain it, then he must pay the price, for he cannot keep the property and the money he was to pay for it. So that which ever way the case is considered, judgment must be for the plaintiff.

The decree of the court of the first instance, which condemns the defendant to the debt and costs, we think meets the justice of the case, and it is, therefore, ordered, adjudged and decreed, that it be affirmed with costs.

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DEVLIN vs. HIS CREDITORS—HAGAN AND CO. APPTS. Eastern District,
APPEAL FROM THE COURT OF THE PARISH AND CITY May 1831.
OF NEW-ORLEANS.

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Where negotiable notes are delivered as security for a debt, and no authentic act is made to evidence the pledge, they will not confer a preference in case of insolvency.

Opposition was made to the homologation of the tableau of distribution for this : That there was no account therein of certain notes which were deposited with John Hagan & Co. by the insolvent, and which formed part of the property ceded by the latter to his creditors." To prove the deposite, interrogatories were propounded to John Hagan & Co. who, in answer thereto stated : that the insolvent, previous to his failure, and at the time of their incurring responsibility on his account, had endorsed over and put into their possession, the notes (which were negotiable) as collateral security. Upon these facts, the court *a quo* sustained the opposition and ordered that the notes be delivered up to the syndics. Hagan & Co. appealed.

Pierce, for appellants, argued as follows : It is sufficient for the court to look at article 2074 of the Napoleon Code, to be satisfied that its construction cannot affect the present question, which rests upon the construction of articles 3123, 3127 and 3128 of our code, to which there is nothing similar in the Code Napoleon. Article 2084 of the French Civil Code expressly states, that the dispositions there made are not applicable to matters of commerce.

Now, in our former code of 1808, p. 446, article 6, there is a provision similar to 2074 of the French Code, and the same in 3125 of our own new code ; yet no one ever pledged a promissory note by other formality than endorsement and delivery. The reason of this was, that it was understood not to affect such transactions as were regulated by the custom of merchants. The only difficulty in this case is, in deciding if the law merchant has been abrogated

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by the new articles 3127 and 3128 of our Civil Code of 1825; we say that they have not—that 3127 provides that a credit not negotiable must be pledged by authentic act, or by act under private signature, duly recorded; and that a copy of this act, duly recorded, shall be served upon the debtor; but that article 3128 says, that no notice is required in the case of notes; because, in case of notes, it suffices that the note shall have been endorsed by the person pledging it, to invest the creditor with the full privilege of a pledgee; and that, therefore, the law, as it stood, is not repealed: that no repeal can be presumed, and the article is express that it suffices to endorse the note, to give the privilege; and that article 3123 is not contradictory to this, for 3128 explains its meaning which is, that he still endorses the negotiable note, though he does make an act of pledge—but that this *endorsement suffices*.

The ordinance of 1673, articles 8, 9, says nothing of bills or promissory notes; and Merlin's report of a decision, in 1769, does not refer to the ordinance; nor does it say that the bearer of the bills, without public act, would not have been good; it could not have been a decision under it, as he refers to the code, art. 2075, which, in art. 2084, expressly excludes matters of commerce.

Conrad, contra.

The provisions of the code, requiring the recording of pledges, are general, and refer to every description of pledge, without distinction; and the clause, in art. 3128, only dispenses with the necessity of notification, in the case of negotiable instruments, and cannot be understood to dispense with the registry required by the previous articles, any more than it can be understood to dispense with the delivery required by the article 3129, which, it is admitted, it does not. He referred the court to Sirey Code *annoté*, page 321, on the 2074 article of the Code Civil, from which the article of our code relied on (the 3125) is copied

verbatim. From the case therein referred to, to be found in the *Rapports* of the same author, the courts of France have decided that this article refers to commercial as well as to other matters. Also, to the *Repertoire de Merlin, verbo Gage*, from which it appears, that according to the ordinance from which the above article, in the Code Napoleon, was taken, pledges of promissory notes were required to be recorded as well as every other description of pledge.

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Porter, J., delivered the opinion of the court.

Opposition was filed in this case to the tableau of distribution, because certain notes deposited by the insolvent in the hands of the appellants, who are his creditors, had not been taken possession of by the syndics, and accounted for as part of the estate.

The court sustained the objection, and this appeal is taken from its decision.

The notes were negotiable, and were endorsed by the insolvent. They were placed in the hands of the appellants some time before his failure, as collateral security, for engagements the depositaries had come under for him.

This transaction the appellees insist, formed the contract of pledge, which must be evidenced by a public act, or by a private one, duly registered in the office of a notary public, at a time not suspicious. The appellants contend, that this mode of evidencing a pledge is not necessary when the object given is negotiable paper: That it is sufficient, if it be endorsed.

The case turns on, and must be decided by the positive provisions of our code.

The first article necessary to be cited is the 3123d. It provides, "that when a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge, and deliver to whom it is transferred, the note or

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obligation, which proves its existence, if it be under private signature, *and* must endorse it if it be negotiable."

From this enactment, an act of pledge is required in all cases, and where the paper is negotiable, the paper must also be endorsed. This conclusion is obtained without interpretation, and is free from all doubt. It is the result of the express language of the law.

The next article of the code declares the extent of the privilege conferred by a pawn thus obtained; and the 3125 enacts that this privilege shall take place against third persons *only*, in case the pawn is proved by authentic act, or by an instrument under private signature, duly registered at a time not suspicious.

So that if these enactments stood alone, there can be no doubt, the claim of the appellants could not be sustained. But they rely on subsequent articles of the code to support their pretensions.

The 3127 "provides, that in case the pawn consists of a credit not negotiable, to enable the creditor to enjoy the privilege above mentioned, it is necessary, not only that proof of the pledge be made by an authentic act, or by act under private signature duly recorded, as stated in the preceding article; but that a copy of this act shall have been duly served on the debtor, of the credit given in pledge."

The 3128th article, on which the appellants mainly rely, is as follows: "On the other hand, the notification of the act of pledge to the person owing the debt pledged, shall not be necessary, if the debt is evidenced by a note or other obligation, payable to bearer or order; because, in that case, it will suffice that the note shall have been endorsed by the person pledging it, to invest the creditor with the privilege above mentioned."

The latter clause of this article, it is contended, explains the 3123d article, so as to make endorsement alone sufficient to constitute the pledge.

This explanation is of too forcible a kind to enable us to adopt it ; for it contradicts, and renders completely inoperative, the rule prescribed in the previous enactment. It is a known principle in the construction of statutes, to give, if possible, all parts of them effect. The interpretation of the appellants violate this rule. The 3123d requires an act of pledge *and* endorsement. The 3128th, according to this interpretation, makes endorsement, without an act of pledge, sufficient. So that the provision in respect to the act of pledge has no effect. The construction of the appellees appears to us more sound. The intention of the legislator was to dispense with the notification, in case the paper was negotiable, and nothing more. The commencement of the article clearly shews this. The general language of its conclusion, must be limited to the evident intention of the law maker.

The rule of construction just alluded to, like all other general ones, is founded in good sense. It would be neither philosophic, or true, to attribute to men of the lowest grade of understanding, the intention of doing a thing one moment, for the purpose of undoing it the next. It can never be presumed of the legislative authority, and it is impossible to resist the conviction, that had they changed their intention between the time they passed the 3123d and 3128th articles, they would not have altered the phraseology of the first, instead of throwing into the latter expressions of a general kind, and doubtful import, to correct their error.

We had written thus far, when it occurred to us to examine the report of the jurisconsults, who were employed to prepare the amendments to the code, and we find, on a perusal of it, a full confirmation of our ideas. On the 3128th article, which was drawn up by them, they observe : " The person owing the debt pledged, when it is a requirable note, being bound only to pay the bearer of it, we have thought it was useless to notify him of the act of pledge, in the case of a similar transfer." They who prepared this article then,

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did not contemplate the endorsement should stand in place of the act of pledge: on the contrary, they recognize its existence, and merely dispense with the notification. The legislature had this report before them when they adopted the amendments to the code, and we have good reason to believe these amendments were passed in the sense of those by whom they were prepared. *See page 127th of the report.*

Something was said of the custom of merchants. That custom is entitled to attention, when it is not opposed to positive law. But the opinions of that portion of the community can neither inform the court, nor in any respect influence its judgment in construing a recent statute.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

BENITE vs. ALVA.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW ORLEANS.

By the laws of Spain prescription ran against a married woman during coverture, for her paraphernal rights.

The facts are stated in the opinion of the court delivered by

Porter, J.

The petitioner was married in the year 1786, to one Guillaume Benite. Some time subsequent to the marriage he purchased a lot of ground, situated in this city, and subsequently sold it to the father of the petitioner. The father died in the year 1795; and immediately after his death, the husband sold again the property to one Gonzalez, under whom the present defendant claims. The petitioner was separated in property from her husband in the year 1830.

This action is brought by her to recover from the defendant part of the lot of which her father died possessed; and

which, she alleges, her husband sold contrary to law, and against her consent.

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The purchaser from her father, and his successors, including the present defendant, have been in peaceable, public, and uninterrupted possession of the premises for thirty-four years previous to the institution of this suit. They plead prescription against the demand of the petitioner.

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The court below gave judgment against the defendant, and she appealed.

It is not contested that the purchaser had not the title, good faith, and length of possession that would have enabled him, under the laws of Spain, to plead the prescription of ten years. But the petitioner contends, that the provision in our code, which suspends prescription during marriage, where the action of the wife might be prejudicial to the husband, was common to the Spanish jurisprudence; and that, although ten years had elapsed from the sale to the time when the Civil Code was adopted, still the prescription did not run.

The case turns on this question. The property alienated was paraphernal: but neither in relation to it, nor to dotal effects, do we find the laws of Spain to conform with the provisions of our code.

By the latter, the dowry of the wife is imprescriptible during marriage, unless a separation takes place. By the 8 law of the 23 title of the 3d Partidas it may be prescribed for, if the wife knows of the husband's dissipation, and neglects to bring her action. *La. Code*, 3490.

In relation to the estate of the wife, which is paraphernal, the discrepancy is more strongly marked. The article in our code which preserves the wife's rights during marriage, when the action she might bring to maintain them would cast a reflection on, or affect the interests of her husband, is taken from the French jurisprudence: and the delicacy which suggested it does not seem to have been equally

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fostered and rewarded in Spain. *Febrero* tells us that, though prescription does not run against the wife for her dotal property during marriage, unless she knew the husband was dissipating it, it does run for the paraphernal; because she may obtain an order from the judge, that her husband give her license to sue. *Febrero*, p. 2, *Lib.* 3, *Cap.* 2. *Sec.* 4. *No.* 243.

Counsel have contended that this rule only applies to cases where the husband neglects to take the wife's property into possession, and not to those where he has received, and alienated it. No authority has been produced for this exception; and we see no solid ground on which it can rest. The passage quoted from *Febrero*, shewing the right of the wife to sue for the property, at the dissolution of the marriage, which her husband may have alienated, evidently contemplates those cases where the purchaser has not acquired the object a sufficient length of time to hold by prescription. It is speaking of the general rights of the wife, without a consideration of the exception which might be opposed to her action, in particular cases. *Febrero*, *Art.* 2d. *Lib.* 1. *Cap.* 3. *Sec.* 1. *Nos.* 47, 48 and 49.

The article in our code was taken from the 2256th of the Napoleon, and copies it. That was derived from Pothier, who assigns as a reason for it, that the influence which the husband exercises over the wife, is supposed to have prevented her bringing an action during this marriage. Several of the provinces of France, he says, act on the principle; and he states it to be a case for the application of the rule, *contra non valentem agere non currit præscriptio*. *Dard*, in his commentary, or rather his annotations, on the Napoleon Code, refers to the French, and not to the Roman law, for the origin of the 2,256th article of that work.

The rule *contra non valentem agere non currit præscriptio*, is, no doubt, a sound one; and where there is an impossibility to sue, its force and equity cannot be disputed: it

is a necessary consequence of laws in relation to prescription; or, rather, it flows from the very principles on which they are established. But where it is extended to cases where there is not an impossibility to bring an action; to those where there is no other impediment but that which is supposed to exist in an unwillingness to sue, from motives of delicacy, affection, or marital influence, the exception ceases to be one, which is presumed universal, as arising out of the nature of things, and must depend for its force on the laws of the particular country, which govern the transaction, to which it is sought to be applied.

Our researches do not enable us to say, it has ever been extended so far in the Spanish law. On the contrary, as often as the writers speak of the matter, they recognise a different doctrine: and we are of opinion the plea of prescription, in this case, must be sustained.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed; and that there be judgment for defendant, with costs in both courts.

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Porter, J., delivered the opinion of the court.

The case is in all respects, similar to that of the same plaintiff against *Alva*, just decided; and must receive a similar decision.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be annulled, avoided, and reversed. And it is further ordered, adjudged, and decreed, that there be judgment for defendant, with costs in both courts.

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**PALMER vs. HAYNES AND CO.—SYNDICS OF FRANKLIN
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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

One who receives a note as a broker cannot claim any property under it as a creditor of the bailor.

The plaintiff was a broker, and in *that capacity* received from one Franklin, a note, to be discounted. He refused, when called on, to deliver up the note; but offered, in discharge of it, other notes which he held of Franklin. After the failure of Franklin, suit was instituted against the makers of the note; in which the syndics of Franklin intervened, and claimed the proceeds, alleging that the note formed part of the effects surrendered by Franklin to his creditors, and came into the possession of the plaintiff by false and fraudulent pretences. There was judgment for the intervening party; and the plaintiff appealed.

Carleton and Lockett for appellant.

Pierce and M'Cauley for appellees.

Porter, J. delivered the opinion of the court:

Suit is brought against the defendants, on their promissory note. The interveners claim property in the instrument sued on, alleging it came into the possession of the plaintiff by false and fraudulent pretences.

The evidence shews the plaintiff acted in the capacity of a broker; that the note was handed to him by an agent of the insolvent, previous to his failure, to be discounted; that he received it for that purpose, and having once got it into his possession, he refused to deliver the proceeds, and offered in discharge of it, other obligations of the insolvent debtor, which had been assigned to him.

There was judgment in favor of the interveners in the court of the first instance, and the plaintiff appealed. The cause as between them and the defendants, was continued.

We think the court did not err. The note was delivered to the plaintiff in his character of broker, to be discounted;

One who receives a note as a broker cannot claim any property under it as creditor of the bailor.

and his receiving it as such, made him the agent of the insolvent. His subsequent attempt to turn this transaction into a contract, by which he acquired a right in himself to the bill, is very unjustifiable; it is as immoral as it is illegal. A late statute of the British parliament makes acts similar to that of the plaintiff, a misdemeanor punishable with transportation, not exceeding fourteen years. It would seem that a legislation of the same kind would not be without its utility in this state.—*Chitty on Bills, Ed. 1830. Page 114.*

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lin intervening.

There is no prayer for damages, or we should have condemned the plaintiff to pay ten per centum on the amount in dispute, for bringing a case before the court in which he could have had no other object, but to delay the parties entitled to the note from receiving its proceeds.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed, with costs.

COTTON vs. CULLEN.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.

If a defendant deny that he is heir, he cannot be made liable until it be shewn that he accepted the inheritance, although by the will, he be appointed executor and residuary legatee.

The defendant was sued *as the only heir* of one Cooksey, who died indebted to the plaintiff in the sum of \$425. The petition was excepted to on the following grounds: 1st, that the defendant was not *the only heir* of Cooksey, as alleged in the petition: 2d, that the petition did not set forth that Cooksey left any succession, where such succession was situate, or that the defendant had accepted the same, either unconditionally or under the benefit of inventory: 3d, that Cooksey resided in the state of Virginia, where he left a will, which, according to the laws of that state, must be administered either by an executor, or administrator *cum testamento annexo*; whose duty it is to pay all the debts of the estate; who keeps possession of it, giving security for the faithful ad-

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ministration of the same, until all the debts of such estate are duly liquidated and paid: upon which event alone, such executor or administrator is bound to pay over the balance, if any, to the heirs or legatees of his testator: 4th, that the petition did not allege, that the deceased left any property within the jurisdiction of the court, or that the defendant had received any part of the estate. These exceptions were overruled; and the defendant answered by denying that he was the heir of Cooksey, or in any manner bound to pay his debts.

It appeared from the evidence, that Cooksey was a resident of the state of Virginia; that he died, leaving a will, wherein the defendant was appointed his executor and residuary legatee; that the defendant proved the will in Virginia, where he qualified as executor, and gave bond, &c.

From these facts the Judge *a quo* was of opinion the defendant had made himself liable, and gave judgment accordingly. The defendant appealed.

Schmidt for appellant.

● *Cannon*, for appellee, contended,

1st. The appellant has himself proven the will of Cooksey; in which will he is appointed testamentary executor and residuary legatee, or in the language of our laws, universal heir.

2d. The probate and homologation of the will at once vested in him the estate in his twofold capacity of testamentary executor and of heir, without any other demand being necessary; for our code (the laws of Virginia not being shown) says: "Neither is the testamentary executor who has the seizure of the estate, and who is at the time a legatee, bound to *demand the delivery of his legacy*. He can retain it in his possession, subject to the same restitution."—*C. C. art.* 1621.

3d. The defendant has not made any protest or declaration, that he severed his capacities of testamentary executor and of heir, which is fatal against him. Our Code says:

"He who is called to the succession, being seized thereof in right, is considered as heir, as he has not manifested the will to divest himself of that right by renouncing the succession."
—C. C. art. 1,007.

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4th. "The renunciation of a succession is not presumed: it must be made expressly by public act before a notary, in presence of two witnesses."—C. C. art. 1,010.

5th. The defendant has not renounced, he only *denies that he is heir*. The plaintiff was only bound, then, to show that the defendant was heir. The defendant ought, when sued for a debt of the deceased, to have taken the benefit of an inventory, or to have renounced the succession. Omitting to do this, he has rendered himself liable to pay the amount of the debt.

Martin, J., delivered the opinion of the court.

The defendant, sued as the only heir of Cooksey, excepted to the petition on the following grounds:

1st. That he is not the only heir of Cooksey, as therein alleged.

2d. That the petition did not state that the deceased had left any property, where situated, or that the defendant had accepted the succession, either generally or with the benefit of inventory.

3d. That the petition sheweth the deceased was a resident of Virginia; that he left a will; and his estate, according to the laws of that state, is to be administered by the executor, who has the possession of it till the debts are paid.

4th. That the petition does not state, directly or indirectly, that the deceased left any property in Louisiana.

These exceptions being overruled, the defendant denied he was Cooksey's heir, and pleaded the general issue.

It was proved that Cooksey was lost at sea, leaving a will by which he appointed the defendant his executor and residuary legatee; that the defendant proved the will in Rich-

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mond, Virginia, and gave bond, according to law, for the faithful execution of the will.

Irwin deposed that, in a conversation with the defendant, he has understood something of the defendant's attending to, or superintending, the sale of slaves belonging to the estate of the deceased; and that the witness further understood that Priddy was agent of a firm that had existed in Richmond between one Prentis and the deceased; and that since the death of the latter, he has understood, the defendant gave Priddy instructions with regard to the disposal of slaves belonging to the partnership. From conversations with the defendant, the witness has inferred, that the former and other persons were the heirs of the deceased. He has further understood that there is property of Cooksey & Prentiss's in New-Orleans; and the defendant, as one of Cooksey's heirs, expects to receive property from Prentis.

Priddy deposed he has heard the defendant say he was one of Cooksey's heirs; that the witness has funds belonging to the firm of Cooksey & Prentis; that he has not paid any money, or delivered any note to the defendant, as heir of Cooksey.

On this testimony the Parish Judge was of opinion, that the defendant being executor and residuary legatee, and having proved the will and taken on himself the charge of its execution, he made himself liable to account for the regularity of his administration to every creditor of the estate, who, on proof of his claim, becomes entitled to be satisfied out of the funds of the estate in the executor's hands. The court, after this, being satisfied of the plaintiff's claim on the estate, gave judgment against the defendant; presuming, from the large penalty of his bond, in Virginia, as executor, (\$20,000,) that the estate is sufficient to pay all its debts.

From this judgment the defendant appealed.

He was sued as heir: it must therefore be shewn, before he be made liable in the present suit, that he accepted the inheritance.

If a defendant deny that he is heir, he cannot be made liable until it be shewn that he accepted the inheritance, altho' by the will he be appointed executor and residuary legatee.

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We have doubted whether the negative, in his first exception, was not pregnant with the affirmative that he was *one* of the heirs. He was sued as the *only* heir; and excepted to the petition, as incorrectly charging him in a capacity which he did not possess. It appears to us, on reflection, the exception is a mere denial of the allegation in the petition.

There is no evidence of any act of the defendant as heir, except what Irwin says: that in a conversation with him, he *understood something* of his, the defendant's, attending to, or superintending the sale of the deceased's slaves. What that *something* was, the witness does not state. To this part of the evidence the first judge does not appear to have attached any importance. The nature of the *instructions* the defendant gave in relation to the partnership slaves, we are not informed; and Preddy, the agent of the partnership, in whose hands its slaves were, is absolutely silent.

When we consider that the defendant was executor to the deceased's will, which contains several legacies to other persons, it is clear, notwithstanding his interference with the property of the estate, he cannot be charged, as an absolute heir, with the whole debts, till he makes himself liable by an act as *absolute* heir: till the debts are paid, and the legacies are paid, the residuary legatee has its option to renounce or accept as a beneficiary heir. His verbal declaration that he is an heir, and expects to receive property as such, are not an acceptance.—*Civil Code*, 983—989.

As there is no evidence of acceptance of the capacity of heir, we think the judge erred in giving judgment against him.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be annulled, avoided, and reversed; and that there be judgment against the plaintiff, as in case of nonsuit, the appellee paying costs in both courts.

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ARMOR
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ARMOR vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A creditor of several debtors, *in solido*, who has received a dividend from the estate of one of them, can only claim from the estate of the others the amount due, after deducting the payment made. And, though he may have proved his debt against each estate, for the whole amount, if he subsequently receives a portion of it, from the estate of one of the debtors, his rights on the estate of the others are estimated in relation to the balance due after deducting *that payment*, not by the amount of his original debt.

The homologation of the tableau filed by the syndics was opposed by certain creditors of the insolvent, because the Bank of the United States, and certain other banks, were placed on the tableau as creditors for the full amount of their debts, alleged to have been due them by the insolvent at the time of his failure, when said institutions had since received from the estates of Morgan, Dorsey & Co. and of William Kenner & Co. (who were debtors for the same debts to said institutions, with the insolvent Armor) dividends to a large amount.

Maybin, for the opposing creditors, contended—that those institutions could only receive the dividend from the syndics of Armor's estate, *on the balance of their debts*, after deducting the amounts received thereon by them, from the estates of Morgan Dorsey & Co. and William Kenner & Co. The court overruled the opposition, and the opposing creditors appealed.

Peirce, for appellees.

Porter, J., delivered the opinion of the court.

The tableau of distribution filed by the syndics, in this case, was opposed in the court of the first instance, because certain creditors were placed thereon, for the full amount of the debt due by the insolvent, at the time of his failure, though since that period they have received from the syndics of Morgan Dorsey & Co. and of William Kenner &

Co., who were also debtors for the same debts, certain dividends, which greatly diminishes the amount these creditors can now claim from the estate of Armor.

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The court of the first instance, after hearing counsel on this opposition, directed it to be overruled, and the opposing creditors appealed.

The question is of considerable importance, and the decision we are about to give, will have a frequent application in the settlement of insolvents' estates. The case has been carefully argued.

Before submitting our views on the merits of this controversy, it will be proper to pass in review the authorities read and referred to, on the argument.

The English rule is thus stated by Eden, in his treatise on bankruptcy :

"The holder of a bill or note is entitled to prove his debt, under a commission against any of the parties to it, and to receive a dividend from each, on his whole debt, provided he does not, on the whole, receive more than twenty shillings in the pound."

"But there is a distinction in this case, where the creditor applies to *prove* his debt, *after* having received a part, and where he applies to prove, *previous* to having received any payment or composition: for, if the creditor, at the time of proving, has received any part of the bill, he can only prove for so much as remains; but, if after having proved for the whole, he receives a part of the bill from any of the persons liable to pay it, he is entitled to a dividend upon the whole, provided it does not exceed twenty shillings in the pound, upon such part as remains due. This was formerly holden otherwise; but it is now completely settled."—*Eden's Bankruptcy*, 155.—*Chitty on Bills* (Ed. 1830) 460, 461.

In France, previous to the enactment of the Code of Commerce, the question now presented to the court, was a

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subject of considerable controversy. The weight of authority appears in favour of the position assumed by the appellants, that the creditor could only present himself against one of the insolvent estates, for the balance due, after deducting that which he had received from another similarly circumstanced; of that opinion was *Dupuy de la Serra, Pothier, Bontarie and Jousse*.—See *Dupuy de la Serra, art. Des Lettres de Change, chap. 16, No. 19 et suivans, page 60*.—*Pothier, Contrat de Change, chap. 5, No. 159*.—*Bontarie, sur l'art. 12, Titre des Lettres de Change; et Jousse, sur l'art. 33, même titre*.

Emerigon was of a contrary opinion, and cites a decision of the Parliament of Aix, in support of the opposite doctrine, which was afterwards reversed, on an appeal to the Council of State. By a singular coincidence, the Parliament of Paris had decided a case similarly circumstanced, directly contrary to that of Aix, on the same day.—*Emerigon, Contrat à la Grosse, chap. 10, sec. 3, vol. —, p. —*.—*Bouilly Paty des Faillites et Banqueroutes, vol. 2, p. 41 à 43*.

The 534th article of the Code of Commerce terminated these discussions in France, by declaring that the creditor, bearer of obligations in *solido*, between the insolvent, and the co-obligers, who were also insolvent, participated in the distribution of all the estates, until he was fully paid.

In Scotland, it is shewn that a different rule from that established in England, prevails. Bell states that the date of sequestration is the point of time at which each creditor, holding joint securities, is entitled to estimate the amount of the debt to be claimed.—*2d Bell's Comm. 338*.

Thompson, a writer on the laws of that country, after alluding to the English rule, and its opposition to that of Scotland, remarks: "That the adoption of the English rule may often lead to capricious results; for example, by making the amount of the dividend obtained from one estate, depend on the accident of the creditor not ranking on it

first, but ranking first on another estate, on which a dividend has been declared, is unquestionable. Nor can it be denied that a dividend drawn from one estate, for the full sum ranked, though it may satisfy on it, does not satisfy the separate security held against another estate. But it may be doubted (he continues,) whether this dividend should not be considered at least as a partial payment to account of the debt; and, if the debt has been thus diminished by the receipt of a dividend from one estate, before it is ranked on another, it does not appear how it can still be ranked for the full sum, as if there had been no such payment. The security which is still held against the separate estate, would rather seem to depend on the actual amount of the debt, so as to diminish in proportion as the debt is diminished."—*Thompson on Bills of Exchange*, 818.

In Spain, the practice appears to be to permit the creditor to prove against each estate, for the full amount of the creditor's claim, unaffected by payments from a co-debtor's estate, which is insolvent.—*Salgado Lib. part. 1, chap. 17*.

The course to be pursued, in matters of this kind, does not appear to have received a judicial determination in the United States, and the citations already made, rather shew how unsettled the law is in Europe, than exhibit a preponderance of authority, on which the court could rest its decision. The case presents itself without any influence from the opinions of others. We feel at liberty to adopt that doctrine which we think will best promote equity among creditors of insolvent estates.

It was urged, in argument, that the rights of the parties were fixed by the bankruptcy, and that they could not be affected by matters subsequent thereto. This position, we think, must be admitted with a good deal of limitation. To many purposes they, no doubt, are fixed; but that they are fixed to such an extent as to enable each creditor, at the time of insolvency, to be paid out of the estate, and in pro-

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A creditor of several debtors in *solido*, who had received a dividend from the estate of one of them, can only claim from the estate of the others the amount due, after deducting the payment made. And tho' he may have proved his debt against each estate, for the whole amount, if he subsequently receives a portion of it from the estate of one of the debtors, his rights on the estate of the others are estimated in relation to the balance due after deducting that payment, not by the amount of his original debt.

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portion to the whole amount then due to him, may be well doubted; a payment by a co-debtor of all the debt, would destroy it at once; and why a payment of a part should not diminish it *pro tanto*, we will next examine.

If a payment had been made previous to the bankruptcy, it is admitted, on all hands, that the creditor could only claim to be placed on the *bilan*, for the balance due, and could only receive a dividend in proportion to that balance. If a payment made after, does not produce the same effect, it must be because the creditor, being placed there, gives him a right to demand his proportion of the whole amount for which he is so placed.

It is not understood by us that, according to our law and practice, any such consequence follows the placing of the creditor on the *bilan* by the insolvent. As between them it may be so, but any other creditor has a right to dispute the existence, and the amount of another's claim, up to the marshalling made by the syndics, on the tableau of distribution, and until that tableau is homologated by the court. The claim of a creditor cannot be considered as fixed, until the power of the other creditors to object to it, terminates.

If there were enough to pay all the creditors, *as* sometimes, though very rarely happens, no one could receive more than the balance due to him, after deducting that which he had received between the insolvency and the distribution. Why he should not be compelled to allow this credit, when he cannot receive the whole amount, must be, because he has a right to claim for more than is due, to enable him to get the whole of his debt paid.

This might be equitable enough, if there were no person concerned but the insolvent and the particular creditor, if others were not affected by it. But we do not see why a creditor, so circumstanced, should be allowed to state what is contrary to the truth, to enable him to recover his whole debt, when other creditors are not permitted to resort to fictions, to obtain the same result. The bankrupt, if his estate

was adequate to the payment of all demands against it, could claim the benefit of any credit which might arise from moneys previously received by the creditor. Where it is not sufficient to discharge the whole, the right of other creditors to obtain the benefit of such payments, appears to us as strong, as that of the insolvent in the case just put.

Our laws contemplate an equal distribution of the estate of the insolvent, among the chirographary creditors, after mortgage and privilege debts are paid. That equality would be destroyed if any one received more than his proportion of the sum really due to him. By deducting what has been received from the original debt at any time previous to the tableau of distribution, we have a simple mode of ascertaining what is due to the creditor,—one which is consonant with truth, and analogous to the mode pursued in liquidating debts in all other cases. The contrary rule seems to us founded on assumptions purely gratuitous and arbitrary, and working a great injustice to other creditors. The leading idea offered in support of it, is, that he has a right to prove against all, until his whole debt is paid. This right, we think, ought to be, and is, subordinate to the rights of the other creditors of the insolvent's estate. No satisfactory distinction presents itself to our minds, between a payment made before and after insolvency: we see no reason why the one should have less effect than the other.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed. And it is further ordered, that the opposition filed in this case be sustained, and that the cause be remanded for further proceedings, the appellee paying the costs of this appeal.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The prescription applicable to overseers does not apply to an agent employed in superintending the construction of a steam engine. This action is barred by the prescription of one year.

Unskilfulness in the agent is not excused by a contract in which it was stipulated he was to be governed by the directions of the principal.

The plaintiff claimed from the defendants a certain sum, for wages as engineer of the steam-boat *Fair Star*, from 11th June, 1826, to 11th July, 1827; also a further sum, for moneys received by the defendants to his use; and damages for the detention of an engine which, he alleged, he had pledged to the defendants to secure them for certain advances, and which they had refused to return, although the advances had been refunded. The petition was filed on the 12th August, 1828—to which the defendants opposed a general denial; the plea of prescription; and, further, they alleged that, by reason of the unskilful manner in which the plaintiff had constructed, for the steam-boat *Fair Star*, a certain engine, they had sustained damages to a large amount; which, together with moneys advanced to the plaintiff, they claimed in reconvention.

By the written agreement entered into between the parties, the plaintiff undertook "to go to New-York, and there report himself to Captain Day as being ready to commence work, in the capacity of an engineer, for building one or more steam engines, and to attend to the casting, erecting, and putting the said engine, or engines, into complete operation for the defendants, and to be guided by their directions; for which services the defendants agreed to pay him one hundred and twenty dollars per month."

It was proven that the plaintiff was in the employ of defendants, under this agreement, for eleven months; during which time he constructed, for the steam-boat *Fair Star*, the engine with which she was brought to New-Orleans: but it was also shown by the testimony of experienced engineers, that the engine was improperly constructed, and that it became necessary for the defendants to take it out as unfit, and replace it with another.

The court *a quo* rejected the defendants' plea of prescription, and disallowed their claim in reconvention for the defective engine, on the ground that as, by the agreement, the plaintiff was to be governed by the directions of the defendants in its construction, he was not responsible in damages for the bad execution of the work. The plaintiff's claim for damages, for the detention of the pledged engine, was rejected, and judgment rendered in his favor, for eleven months' wages, at \$120 per month; and for certain moneys which, it was proved, the defendants had received to his use. From this judgment the defendants appealed.

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Lockett and M' Caleb for appellants.

Preston for appellees.

Martin, J. delivered the opinion of the court.

The plaintiff claims \$4,324 90, for debt, and \$2,000 for damages; alleging the defendants received for him \$460, from Dicks, Booker & Co., and employed him as an engineer, to go to New-York, to engage to build one or more steam-engines for them, and under their direction; and agreed to pay him at the rate of \$120 per month besides his passage out and in, and his board and lodging, on which account \$1,560 are due him, besides \$60 for a half-month's wages in one of their boats. Further, that he pledged to them a steam-engine for sawing planks and scantling, as a security for sundry advances made, and to be made, to him; that they engaged to leave it in his possession; but, afterwards took it away, and refused to restore it, although the advances they had made were refunded, whereby he has sustained damages to the amount of \$2,000. Further, that he sold them the use of a patent-right in New-York and Louisiana.

The defendants pleaded the general issue and prescription. They filed an account exhibiting a balance of about \$6000 due them by the plaintiff, which they urged in reconvention.

The District Judge allowed the first and second item—

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the one not being disputed, and the other proved. The third item was also admitted. The claim for damages on account of the detention of the pledged engine was rejected, as well as the demands for the sale of patent-rights. The defendants' plea of prescription was disallowed. Their claim in reconvention for moneys advanced was allowed; but that for damages was rejected. Judgment was given for a balance of \$604 69, in favor of the plaintiff; and the defendants appealed.

The counsel for the appellants urge the court erred in disallowing their plea of prescription to the claim of the appellee for work and labor, and their own claim for damages sustained by his want of skill and experience, and the unworkmanlike manner in which the steam engines were made.

The appellants contend the appellees' claim for work and labor performed in New-York, in building steam engines, was prescribed under the Civil Code, 3499, by which *the claims of workmen, laborers, and servants, for their wages*, are prescribed by the lapse of one year. The appellees' counsel contends that his client's salary was that of an *over-seer*, which is prescribed by three years. The District Judge did not consider the appellee as a workman, or overseer, but as an agent, and disallowed the prescription for his services in New-York, but allowed it as to his services on board of the appellant's boat.

Damages were denied to the appellants for the injury they sustained from the unskilful and unworkmanlike manner in which the appellee acted in New-York; on account of his being to be governed by the direction of the appellants; and, hence it was to be concluded, he was not responsible, or liable in damages, for the bad execution of the work, which must be taken to be according to the appellants directions.

I. According to the agreement on file, the plaintiff undertook to go to New-York, and report himself to Captain Day.

on being ready to commence work in the capacity of an engineer for building one or more steam-engines, and to attend to the casting, erecting and putting the said engine or engines in complete operation.

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We think the District Court erred in disallowing the plea of prescription. The plaintiff was a workman; and his claim was barred by the lapse of one year.—*Civil Code*, 3499. He was not, as his counsel contends, an overseer.—*Id.* 3503.

The prescription applicable to overseers does not apply to an agent employed in superintending the construction of a steam engine.—This action is barred by the prescription of one year.

Unskillfulness in the agent is not excused by a contract on which it was stipulated he was to be governed by the directions of the principal.

From the plaintiff's acknowledgments in his letter on record, it appears that his work was unskillfully performed, from his want of attention and skill; and we do not think that the circumstance of the agreement providing that he should be guided by the defendants, can repel their claim on account of the insufficiency of his work.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed, and the case remanded, for the purpose of ascertaining the amount of the defendants' claim on the reconvention; the plaintiff and appellee paying costs in this court.

SAME vs. SAME.

APPEAL FROM THE COURT OF THE FIRST DISTRICT,

If a claim be barred by prescription, it still may be offered by way of exception.

Martin, J., delivered the opinion of the court.

This case was lately remanded to the District Court, with instructions to ascertain the amount of damages due to the defendants on their claim in reconvention. They have been assessed at \$6050 81; from this sum he has deducted \$612 79; admitted by the defendants to be due him, and given judgment for \$5438 02, and decreed the defective engine to be returned to the plaintiff.

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HANSE & HERR.

If a claim be
barred by prescription
it still may be
offered by way of
exception.

The plaintiff has claimed wages as a set-off or a compensation against the claim in reconvention; although he has made no claim for these wages, and his action for them is barred by prescription, yet he may successfully plead them in compensation. *Quæ temporalia sunt ad petendum, perpetua sunt ad excipiendum.* But the defendants have urged the plaintiff performed his work so unskillfully, that he earned no wages. The District Judge has given as damages that sum which the witnesses judge it would cost to have a perfect and new engine, of the powers and dimensions of the defective one. On this score the plaintiff is entitled to his wages; they amount, with his board, to \$1714 19; which reduces the claim in reconvention to \$3723 83.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and that the defendants have judgment for (\$3723 83) three thousand seven hundred and twenty-three dollars and eighty-three cents; and that they restore to the plaintiff the defective engine, and a smaller one which they received in pledge; that they pay costs in the District Court, and the plaintiff in this.

CHARBONNET vs. TOLEDANO.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.

The sole intention of the legislature in the article 3128, was to dispense with the service of the act of pledge required by the preceding article, in case of paper not negotiable.

This suit was brought to recover from the defendant a note of the plaintiff's which the latter had intrusted to Chauveau, a broker, to get discounted. It appeared from the evidence that Chauveau died suddenly, with the note in his possession, which was afterwards delivered to the defendant by Chauveau's widow. The defendant offered in evidence a

book of Chauveau's (and in the handwriting of the latter) by which it appeared that the note in question had been discounted by the defendant: and it was further shown that the defendant was in possession of the note previous to Chauveau's death; but there being some informality in it, it was returned to Chauveau, to get a new one from the plaintiff. There was a verdict, and judgment for the plaintiff; and the defendant appealed.

Canon for appellant.

De Armas for appellee.

Martin, J. delivered the opinion of the court.

The defendant and appellant complains of the judgment which decrees him to surrender the plaintiff's note, pledged to the defendant by the plaintiff's broker, who had received it to raise money upon; the pledge or pawn being for a debt of the broker, and was by an act *sous seing privé*, which was never recorded.

The Civil Code, 3123, provides that a debtor who wishes to pawn a claim, must make a transfer of it, *in the act* of pledge, and deliver to the creditor the note or obligation which is the evidence of it, and endorse it if it be negotiable.

The article 3127 provides that where the note is not negotiable, a copy of the act of pledge shall be served on the debtor of the note or obligation given in pledge.

The following article provides that, "on the other hand, this notification of the act of pledge to the person owning the debt pledged, shall not be necessary if the debt be evidenced by a note, or obligation payable to the bearer, or to order; because, in that case, it shall suffice that the note or obligation be endorsed by the person pledging it, to enjoy the privilege above mentioned: i. e. a privilege against third parties.

The 3125th requires a notarial act, or one *sous seing privé* duly recorded, to enable the pledgee to avail himself of his right, against third persons, in all cases.

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May 1881.

CHARBONNET
vs.
TOLE DANO.

Eastern District,
May 1831.

CHARBONNET
vs
TOLEDANO.

The sole intention of the legislature by the article 3128, was to dispense with the service of the act of pledge required by the preceding article in case of paper not negotiable

We think the Parish Court did not err. The sole intention of the Legislature, in the article 3128th, was to dispense with the service of the act of pledge on the debtor of the debt pledged, (required by the preceding article in case of paper not negotiable), where the note pledged was payable to bearer or order: i. e. negotiable. The service of the act of pledge, in case of paper not negotiable, was to prevent the debtor from paying it to the original creditor, the pledgors—a caution unnecessary in the case of negotiable paper, which the maker knows he cannot safely pay to any but the holder.

Notwithstanding the endorsement of the pledgor, the law requires an act of sale, for the security of the other creditor of the pledgor.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be affirmed, with costs in both courts.

PASSEMENT vs. NORWOOD.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where the verdict of the jury is not manifestly wrong, it will not be disturbed

The facts are stated in the opinion of the court, delivered by

Porter, J.

This case turns entirely on questions of fact. A great number of witnesses were examined on the trial; and the testimony of some of them is contradictory. After an attentive examination of the evidence, we have great difficulty in saying whether the conclusions of the jury are those to which we would come: but, at all events, the amount we should consider due to the plaintiff, would not vary materially from that established by the verdict; and under such circumstances we do not think the judgment below should be disturbed.

Where the verdict of the jury is not manifestly wrong, it will not be disturbed.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

Eastern District,
May 1891.


PASSEMENT
vs.
NORWOOD.

THE STATE vs. LEWIS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

It is a good cause of recusation in a judge, that he is owner of a pew, when the plaintiff seeks to recover the ground on which the Church is erected.

Suit was instituted in the Court of the First District against the rector and church wardens of Christ Church, the object of which was, to obtain the property on which the corporation had erected a church. When the cause came on for trial, the judge recused himself on the ground that, being the owner of a pew in the church, in his own right, he was directly interested in the event of the suit. A rule was then taken on him to show cause why a writ of *procedendo* should not be issued against him. Cause was shown whereupon.

Martin, J., delivered the opinion of the court.

A rule having been obtained against the judge, to show cause why a writ of *procedendo* should not be issued against him, directing him to proceed to trial, in the case of *Clark et al. vs. the Rector and Wardens of Christ Church*—he made his return as follows: "I am owner of a pew, in Christ Church, in my own right, and not in common with the other corporators. This pew is designated by No. — and has fixed limits, and, in it, no one has a right to enter but the owner, and I consider it as my separate and individual estate, which I can sell, or otherwise dispose of, without the will or consent of others; and consequently I have a direct interest in the event of the suit: which is respectfully submitted."

It is contended the judge erred in recusing himself; because, by an act of the legislature of the 9th of January,

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STATE
vs.
LEWIS.

1825, it is provided that, in all civil and criminal cases, in which the State, the parishes or the politic or religious incorporations (except the banks or other moneyed institutions) are interested, it shall not be a sufficient cause to challenge the judge or justice of the peace, who have cognizance of the case, to allege that they are citizens or inhabitants of the state, or of the said parishes, or members of the said politic or religious incorporations, or that they pay a State, parish or city tax.—2 *Moreau's Digest*, 295.

It is clear the mere circumstance of the judge being a member of the corporation, which is a religious one, does not prevent him from trying the cause; but besides his interest in common with the other corporators, he informs us he is the owner of a pew, in the church; and the object of the suit is to recover the very ground on which the church is built. This pew, he says, is part of his separate and individual estate, which he may sell and dispose of: we are ignorant whether he could not sell it to a person not a member of the corporation, and rather believe he could. The vendee would then certainly have an interest, in the present suit, which would not be within the provision of the act of 1825, which would consequently exclude him. If this be correct, the additional circumstance of the owner being also a member of the corporation, ought not to prevent his exclusion.

Such is the law with regard to witnesses, for the act of March 20, 1806, provides that "the interest which witnesses may have as members of the said corporations only, is not a sufficient reason for excluding their testimony; and that, unless the said witnesses have, in the cause, a particular interest distinct from that which they have in common with the other members of the said corporations, they shall be creditable witnesses, and shall be admitted as such, to give evidence in causes in which the said corporations are parties.—*Id.* 528.

The interest which a man has in the property of a corporation, as a member thereof, is not his private property, and cannot be sold to satisfy his creditors; but if, independently of his membership, he is the owner of a pew, he has an interest therein distinct from that of those who have no pew, and, indeed, from that of owners of other pews. This interest, the act of 1806 expressly says, shall exclude him from being a witness; a disability which it would be our duty to imply, were it not expressed; it must *a fortiori* exclude him from being the judge of the cause.

Eastern District,
May 1881.

STATE
vs.
LEWIS.

It is a good cause of recusation in a judge that he is owner of a pew where the plaintiff seeks to recover the ground on which the church is erected.

If there be a religious corporation, in which every member of a corporation has a distinct pew, which constitutes part of his separate estate, and which he may sell or otherwise dispose of; then this corporation is virtually not one of those contemplated by the act of 1825; for, independently of their common interest in the concerns of the corporation, the members have a *private* interest in what is the object of this distinct ownership.

The judge, in our opinion, did not err, and the rule must be discharged.

ALLAIN vs. PRESTON.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where an amendment to a petition contains matter of substance, and the cause is tried without an answer to it, it will be remanded for want of the *contestatio lites*.

The defendant was sued on his promissory note, and also for a year's rent due to the plaintiff. A general denial was put in on the 6th May, and in November following, on motion of the plaintiff's counsel, and with the consent of the counsel for the defendant, it was ordered by the court that the plaintiff have leave to amend his petition by praying for a rescission of the contract of lease, &c. No answer was put in to the amended petition; and in this state of the pleadings the cause was tried on appeal.

Eastern District,
May 1881.

ALLAIN
vs.
PRESTON.

Porter, J. delivered the opinion of the court.

This suit was brought for one year's rent of property leased by the plaintiff to the defendant Preston, on a promissory note, and to recover the penalty agreed on by the parties, at the time the contract of lease was entered into.

To a petition setting out these matters an answer was put in, and the cause stood at issue for some time. Subsequent to the filing of the answer, the following entry is found on the record:—"On motion of C. Janin, Esq. of counsel for the plaintiff, and with consent of counsel for the defendant, it is ordered by the court that said plaintiff have leave to amend his petition by praying for a rescision of the contract of lease mentioned in this petition, and by claiming the rent up to the date of the judgment to be rendered therein."

On the argument of the cause it appeared to us that this was a very informal, and quite novel mode of amending a petition; the leave to amend being one thing, and the actual amendment, another. On inquiry, however, from practitioners at the bar, we are informed that where the particular species of amendment which the court grants is set out in the order, that it has been usual to consider the amendment made, without filing a supplemental petition. We still think the practice a loose one; but we are unwilling to disturb it: for if generally understood, the ends of justice are, perhaps, as much promoted by it as under the more formal mode of proceeding.

In this case, however, there was neither answer put in to the amendment, nor judgment by default taken for want of it; and the cause was tried below without the *contestatio lites*. The amendment is not one of form, but of substance; the cause must, therefore, be remanded. The answer first put in cannot, either in reason or by presumption of law, be held to extend to an amendment subsequently made, by which other and important matters were demanded of the defendant.—*Sec. 2. N. S. 257. 8 ibid. 299, 301.*

Where an amendment to a petition contains matter of substance, and the cause is tried without an answer to it, it will be remanded for want of the *contestatio lites*.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed. And it is further ordered, adjudged, and decreed, that the cause be remanded to the District Court, to be proceeded in according to law; the appellee paying the costs of the appeal.

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May 1881.

ALLAIN
vs.
PRESTON.

BOURGUIGNON vs. BOUDOUSQUIE.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If the damages assessed by a jury appear to be enormous and unsupported by the testimony, the judgment will be reversed.

Mathews, J., delivered the opinion of the court.

This suit was commenced originally to establish the limit or boundary of contiguous tracts of land, claimed by plaintiff and defendant. The former obtained a judgment by which she gained about thirteen arpens; and the suit is now prosecuted to recover damages, or, more properly, the fruits and revenues of the land which was adjudged to the plaintiff, for the period during which it was possessed by the defendant. The cause was submitted to a jury in the court below, who estimated the damages at nine hundred and ninety dollars, and gave a verdict for this amount. From a judgment rendered in pursuance thereof, the defendant appealed.

Previous to taking the appeal, a motion was made for a new trial, which was overruled. This motion appears to have been based on the ground of excess in the damages allowed by the jury, as being wholly unsupported by the evidence of the case.

We agree in opinion with the counsel of the defendant, and think the judge *a quo* erred in not granting the new trial. It is not a case without data constituting a criterion by which damages may be estimated, independent of arbitrary opinions entertained by a jury. It is not like a claim of reparation in damages for injuries done to the person or reputation

Eastern District,
May 1881.

BOURGUIGNON
vs
BOURDOUSQUIE.

of an individual. But even in these cases, perhaps, it would be a duty incumbent on courts to palliate excesses committed by juries. The dispute remaining to be settled between the parties, at this time, relates to the annual value of thirteen arpens of land, (one only of which is stated by the testimony to be arable, the other twelve being swamp,) from 26th of April, 1825, to the present period. The witnesses suppose that the acre susceptible of cultivation, would produce eighteen barrels of corn annually, if properly cultivated. Now if one-half be allowed to the proprietor, (which would be a very extravagant rent,) the annual product would be, probably, nine dollars: this sum multiplied by six, the number of years which the defendant is presumed to have possessed in *mala fide*, the product would fall far, *very far* short of the verdict of the jury. Nor would the deficit be made up in any rational manner by allowing an excessive rent for the swamp as pasture-ground.

If the damages assessed by a jury appear to be enormous and unsupported by the testimony, the judgment will be reversed.

The damages assessed by the jury appear to us so enormous, so illy supported by the testimony of the cause, that we feel ourselves compelled to reverse the judgment of the court below.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be avoided, reversed, and annulled, and the verdict set aside. And it is further ordered, that the cause be sent back to said court, to be tried *de nova*; and that the appellee pay the costs of this appeal.

LOUISIANA COLLEGE vs. STATE TREASURER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Whether the writ of mandamus can be used for the purpose of enforcing the payment of a sum of money? Quere.

Writs of mandamus never issue to officers charged with a public duty, to do any act, where the law vests them with a discretionary power.

Upon the application of the trustees of the College of Louisiana, a mandamus was served upon the defendant,

requiring him to show cause why he should not pay to the applicants a sum of money to which they conceived themselves entitled, under an act of the legislature. Upon hearing, the rule was discharged, and the trustees appealed.

Waggaman and Miller, for appellants.

Attorney General for appellee.

Porter, J., delivered the opinion of the court.

The 834th article of the Code of Practice, enacts that a mandamus may be directed to public officers to compel them to fulfil any of the duties attached to their office, or which may be legally required of them.

The College of Louisiana conceiving itself entitled to a certain sum of money, under a legislative grant, to be paid out of the State Treasury, applied to the officers at the head of that department, for the sum which the applicants conceived due. He refused to pay it, and they obtained a rule from the court below, under the article already cited, to comply with their request, or show cause why a peremptory mandamus should not issue to compel him.

Cause was shewn, and the judge discharged the rule. The party applying for the mandamus appealed.

It is very doubtful whether this writ can be used, for the purpose of enforcing the payment of a sum of money, even under the broad and comprehensive terms of the Code of Practice. But the opinion we have formed on another part of the case, renders it unnecessary to express ourselves positively on this question.

By an act of the legislature, passed the 18th of March, 1809, it is made the duty of the treasurer to examine all claims of every description, made on the Treasury of the State, and if, *in his opinion*, such claims are not provided for by law, are exorbitant, unjust, or unreasonable, he is authorized to refuse payment of the same, and the claimant is directed to seek relief from the legislature.

It is a well settled principle that writs of mandamus

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vs.
STATE TREASU-
RY

Whether the writ of mandamus can be used for the purpose of enforcing the payment of a sum of money? Quere.

Writs of mandamus never issue to officers charged with a public duty to do any act where the law vests them with a discretionary power.

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never issue to officers charged with a public duty to do any act, where the law vests them with a discretionary power. If they exercise that discretion illegally, and improperly, they are responsible or not, as the case may be, in an action. But they cannot be compelled to do an act contrary to their opinion, when the law says that opinion is the guide they must follow. This is clearly established by the authorities cited by the defendant's counsel.—1 *Cranch*, 137 and 169. 19 *John*. 259.—It is also admitted to be the rule in a case not cited, which is the strongest that can be found in the books, in support of the pretensions of the plaintiffs.—1, *American Law Journal*, 457.

We see nothing unconstitutional in the discretion thus vested. The body that made the grant, had the right to prescribe the mode in which it should be paid.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

CLINE vs. CALDWELL.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF
NEW-ORLEANS.

When the evidence is not conclusive, the cause will be remanded to be submitted to another jury.

This was an action on a breach of contract, wherein the jury found a verdict of \$1000 for the plaintiff. On appeal, the Supreme Court not deeming the evidence conclusive, the cause was remanded for a new trial.

Worthington and *Morse* for appellant.

Eustis and *Dunbar*, for appellee.

Martin, J., delivered the opinion of the court.

This is an action for damages, alleged to have been sustained by the plaintiff, a rope dancer, on a breach of contract, by the defendant, the manager of a theatre; the former had a verdict and judgment for one thousand dollars, and the

latter appealed, after an unsuccessful effort to obtain a new trial.

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May 1881

The evidence is not conclusive, and after a mature consideration, we think the justice of the case demands that the case should be submitted to another jury.

CLINE
vs.
CALDWELL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the verdict set aside and the case remanded for a new trial; the appellees paying costs in this court.

Where the evidence is not conclusive the cause will be remanded to be submitted to another jury.

BOSWELL vs. LAINHART ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The casual insertion in a bond of an additional clause or condition not contemplated by the legislature, will not bind the surety.

If a bond be taken with reference to a particular law, it must be construed by it.

By an act of the Legislature of 1828, Henry Lainhart was authorized to raise, by means of a lottery, the sum of six thousand dollars; provided that a bond, with sufficient security, to the Governor be given, conditioned for the faithful drawing of the same, and for the expending so much of the sum raised under the authority of the act as may be necessary for the construction, and the application to the use, of a steam-engine made according to his new mode of generating steam and applying it to the propelling of machinery. It was further enacted, that in consideration of the privilege granted, the said Henry Lainhart shall, before availing himself of the said privilege, assign over to the Governor and his successors in office, for the use of the State of Louisiana, the right of causing to be made and using steam-engines on the improved plan, invented by the said Henry Lainhart, for all works properly belonging to the State. In pursuance of this act, Lainhart entered into a bond, with William Gormley his security, in the penal sum of \$12,000, with the con-

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May 1831.

ROSWELL
vs.
LAINHART & AL

dition required by the act, and the further condition *that he would pay, and cause to be paid, according to the scheme of said lottery, all and every prize and prizes that should be drawn by tickets purchased and to be purchased in said lottery.* The plaintiff purchased a half-ticket, which drew a prize of \$1000, which Lainhart refused to pay, and to recover which this suit was brought against him and his security Gormley. The court *a quo* gave judgment against Lainhart, and dismissed the suit as regarded the other defendant, Gormley. The plaintiff appealed.

Seghers for appellant.

Preston, for appellee, made the following points:

1st. The law provides only for a bond to secure that the lottery *shall be drawn*, and for the appropriation of \$6000 of the profits to the improvement in steam.

2d. The condition that Lainhart should pay the prizes is null, because the Governor had no authority to take the same.—*M'Caleb vs. Maxwell*, 5 Mass. Rep. 191. 13 Mass. Rep. 262.

Martin, J. delivered the opinion of the court.

The plaintiff and appellant complains of the judgment of the District Court, which disallowed his claim on the defendant as surety of Lainhart, on a bond given by the latter to the Governor, in consequence of the privilege granted by the Legislature to raise a certain sum of money by lottery; the plaintiff being the holder of a ticket entitled to a prize. The penalty of the bond is \$12,000.

By the act granting the privilege of a lottery to the defendant's principal, a bond with surety for the drawing of the lottery and the application of \$6000 to a certain purpose, was required. The governor took a bond, with the further condition, that the prizes be faithfully paid. The District Judge thought the bond required by the Legislature was intended only for the security of the state to insure the

drawing of the lottery, and the faithful application of the proceeds to the use for which they were intended.

We think he did not err. The casual insertion of an additional clause, not contemplated by the Legislature; the smallness of the penalty, merely the double of the sum to be applied to the intended use, will leave the rights of the public absolutely unprotected, if the sum could be objected, as it would immediately be by the holders of the tickets.

As to the principal debtor, there cannot be any doubt of his liability; but the surety bound himself only to pay the penalty to the state on certain conditions. The bond is taken with reference to the law, and must be construed by it. Nothing shews any claim under it to any part of the penalty by individuals.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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vs.
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The casual insertion in a bond of an additional clause or condition not contemplated by the legislature will not bind the surety

If a bond be taken with reference to a particular law, it must be construed by it.

LIPPINCOTT vs. LOUISIANA INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If a vessel be insured for six months trading between New-Orleans and any port in the West Indies, United States, or Gulf of Mexico, except Rio Grande, or Brasos of St. Jago, the port of New-Orleans is made one of the *termini*; and a voyage between a port in the West Indies and the United States is not within the policy.

This action was brought to recover the amount of a policy of insurance upon the schooner Volant, "trading between New Orleans and any port in the West Indies, United States or Gulf of Mexico, except Rio Grande, or Brasos of St. Jago."

It was admitted that the schooner sailed from New Orleans to Matanzas, where she arrived, and proceeded from thence to Savannah, on which voyage she was lost by one of the perils insured against, and within the period comprized in the policy. On the trial the plaintiffs offered in evidence the following written application, made to the defend-

26	389
52	789
2	399
114	152

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ants, and by them accepted:—"Insurance is wanted on schooner Volant for the term of six months, with permission to trade to any port in the West Indies, Gulf of Mexico, or United States." The introduction of this document was opposed by the defendant's counsel, on the ground that it varied the terms and conditions of the policy in respect to the voyage insured therein, which was free from all ambiguity. The court admitted the document, and the defendants excepted.

It was proved that no greater premium would have been charged at other insurance offices, for the risks specified in the written application, and that specified in the policy.

There was a verdict and judgment for the plaintiffs, and the defendants appealed.

Eustis for appellants.

Slidell for appellees.

Porter, J. delivered the opinion of the court.

The plaintiffs insured with the defendants their schooner Volant, for the term of six months, "trading between New Orleans and any port in the West Indies, United States, or Gulf of Mexico, except Rio Grande or Brassos of St. Jago." The vessel was lost in a voyage between Matanzas, in the island of Cuba, and Savannah.

If a vessel be insured for six months' trading between New Orleans and any port in the West Indies, U. States, or Gulf of Mexico, except Rio Grande or Brassos of St. Jago, the port of N. Orleans is made one of the *termini*, and a voyage between a port in the West Indies and one in the U. States is not within the policy.

We are of opinion that by the terms of the policy, the port of New-Orleans is made one of the *termini* of the voyages insured, and that a voyage between a port in the West Indies and a port in the United States, is not a voyage between New Orleans and any port in the West Indies, United States or Gulf of Mexico.

We think this is so clearly the meaning of the language used, that it is impossible to make it plainer by reasoning or illustration. On the trial, the plaintiffs produced the written proposals made to the company, and accepted by them, to shew that a voyage such as that on which the schooner was lost, entered into the contemplation of the parties; that it was so particularly understood by the plaintiffs; and that

the terms inserted in the policy must have been placed there through error or fraud. Eastern District,
May 1881

The court received the evidence, though objected to; and the jury having found a verdict against the defendants, which was confirmed; they appealed. LIPPINCOTT
vs.
L.A. INSUR. CO.

We think the court erred. Admitting the document offered to be legal evidence to control the written policy, in any case, (on which we express no opinion,) we are satisfied that it could not be introduced by the plaintiffs in the present action. If error or fraud occasioned a contract to be executed in writing different from the intention of the parties, it was the duty of the party relying on such an allegation, to make it the basis of his action, to give notice of it to the defendants, and afford them the means to meet, and, if in their power, to refute it.

The action in this instance is on the policy; and that policy shews a voyage different from that on which the vessel was lost.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and that there be judgment for the defendants, as in case of nonsuit, with costs in both courts.

LALAURIE vs. CAHALLEN.

**APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.**

The debt is not novated when the vendor consents that the person proposed as endorser, may if he chose pay the price in cash.

When the last bidder does not comply with the terms of sale, the law authorizes the property to be put up again for sale; but it does not *make it the duty of the vendor to do so*, and leaves him at liberty to pursue all other legal remedies.

It is discretionary with the court to grant to the vendee a delay to comply with the conditions of the sale.

The defendant was the last and highest bidder, for a lot of

Eastern District, May 1881. ground offered by the plaintiff at auction, on a credit of six and twelve months, for a note satisfactorily endorsed.

LA LAURIN
vs.
O'MALLON.

The defendant, on the day of sale, named to the auctioneer his endorser, who was approved of by the plaintiff. The endorser, when called on, observed that he had money in his hands belonging to the defendant, and instead of endorsing would prefer paying cash. This proposition was accepted by the plaintiff, but never carried into effect; and the present suit was brought to rescind the sale. The defendant pleaded novation. There was judgment against him; from which he appealed.

Preston, for appellant, contended that the defendant was not put in delay, and cited the case of *Erwin vs. Fenwick*, 6th *Martin*, N. S. 229.

Martin, J. delivered the opinion of the court.

This suit is brought for the rescision of the adjudication of a lot, sold by auction, at which the defendant was the last and highest bidder, on account of his neglect to comply with the terms of the sale. He pleaded a novation of the debt. There was judgment against him, and he appealed.

The testimony shows the lot was sold on a credit, the purchaser giving an approved endorser. The defendant, to whom the lot was struck, offered Ramos as his endorser, who, on being called to endorse, proposed to pay the money down, which was accepted; he, however, neglected to do so for a long time, and died.

The defendant's counsel has contended that there had been a novation of the debt: that he was not put in *mora*, relying on the case of *Erwin vs. Fenwick*, 6th *Martin*, N. S. 229: that the plaintiff ought to have had the lot sold a second time: that the defendant is entitled to a reasonable time to comply with the conditions of the sale; that the damages are excessive.

A debt is not novated where the vendor consents that the person proposed as indorser may, if he chose, pay the price in cash.

1st. There has been no novation. The plaintiff consent-

ing that the person proposed as endorser might, if he chose, pay the price in cash, did not discharge the principal debtor.

2d. The evidence shews a call on the defendant to comply with the conditions of the sale.

3d. The Civil Code, 2589th, authorizes the property to be put again for sale, when the last bidder does not immediately comply with the terms of the sale; but it does not make it the duty of the vender to do so, and leaves him at liberty to pursue all other legal remedies.

4th. The Parish Judge did not err, in not allowing to the defendant delay to comply with the terms of the sale. The Code does not make it an imperious duty on the court, (2540) but authorizes it. In the present case it was not asked.

5th. The damages do not appear to us excessive.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs in both courts.

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May 1881.

LALABRIE
vs.
CAHALLAN.

Where the last bidder does not comply with the terms of sale, the law authorizes the property to be put up again for sale, but it does not make it the duty of the vendor to do so, and leaves him at liberty to pursue all other legal remedies.

It is discretionary with the court to grant to the vendee a delay to comply with the conditions of the sale.

FOUCHER vs. LEEDS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Although a lease be cancelled, if the lessee remains in possession, he is liable for the rent, on a tacit reconduction, in the same manner as if he had held over, after the lapse of the time for which he had obtained the lease.

Judgment can only be given for the rent due at its date.

The plaintiff had leased to the defendant a lot of ground, and afterwards caused the lease to be annulled by a judgment to that effect, rendered against the defendant. Notwithstanding this judgment, the defendant retained possession of the lot, and the present suit was brought to recover the rent, at the rate of thirty dollars per month, being the price agreed upon when the lot was first leased. The defendant pleaded in avoidance the judgment by which the lease was annulled, and denied having rented the lot since the rendition of the judgment. The plaintiff introduced

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FOUCHER
vs
LEEDS

parol proof to show that thirty dollars per month was the price at which the lot was first leased; that it was well worth that sum, and that the defendant had occupied the lot since the rendition of the judgment annulling the lease. To the introduction of this testimony, the defendant objected, on the ground that it was illegal and irrelevant to the pleadings. The objection was overruled and the defendant excepted. The court *a qua* gave judgment in favor of the plaintiff, for the amount of the rent due—and further decreed, that the defendant pay rent at the rate of thirty dollars per month, until he delivered possession of the lot to the plaintiff. The defendant appealed.

Carleton and Lockett, for appellant.

Seghers, for appellee.

Martin, J., delivered the opinion of the court.

The plaintiff claims the rent of a lot of his; the defendant pleaded the general issue, and if he ever rented the plaintiff's lot, the lease was annulled by a judgment.

The plaintiff had judgment for the rent, till the day of the inception of the suit, with interest from the date of the judgment, till paid, and for the rent, from the day of the inception of the suit, till the defendant surrenders the possession of the lot. The defendant appealed.

It is in evidence, that the defendant leased the lot at \$30 per month, that the lease was set aside by a judgment obtained by the plaintiff, but the defendant still occupies the

Although a lease be cancelled, if the lessee remain in possession, he is liable for the rent on a tacit reconduction, in the same manner as if he had held over after the lapse of the time for which he had obtained the lease.

Objection was made to the introduction of parol evidence, to show the value of the lot on rent, as the lease is proven to have been set aside, and there is no claim on a *quantum valebat*, nor any averment of the value of the rent.

It is in evidence, that after the lease was set aside, the defendant remained in possession, and he thereby became liable to the plaintiff's claim, on a tacit in contradiction, in the

same manner as he had held over, after the lapse of the time for which he had obtained the lease. Eastern District,
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But the judge, in our opinion, erred in giving judgment for the rent beyond the date of it; for we are ignorant of any manner in which the officer who issued the execution, as he who carries it into effect, may ascertain whether the defendant held possession beyond the date of the judgment, or for how long.

FOUCHER
vs.
LEEDS.

Judgment can
only be given for
the rent due at its
date.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of eight hundred and seventy dollars, for the rent of his lot, to the last day of December, 1830, with interest at five per centum thereon till paid, with costs below, but that the appellee pay costs in this court.

SMITH vs. ROBINSON.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Demand of payment at a place designated by the note, is a condition precedent to a recovery on it.

The defendant and two others executed their joint and several note, payable to the plaintiff or order, at the counting-house of M. White, in the city of New-Orleans.

Sometime after the note fell due, it was handed by White to an attorney for collection, who instituted suit against the defendant. A judgment by default was taken which was afterwards made final, upon the following testimony: The plaintiff's attorney deposed that he had seen the defendant in New-Orleans, after the note had been handed to him by M. White, *as the agent of plaintiff*, and informed him he was directed to bring suit.

The defendant begged a short delay, until he saw M. White *again*, and observed, at the same time, that Bynum ought to pay the note, as he, the defendant, was a mere security.

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A rule was taken on the plaintiff by the defendant's counsel, to show cause why the judgment should not be set aside on the following grounds: 1st, that there was not legal grounds to support the judgment; and, 2dly, that the defendant was not responsible for the amount decreed against him. The rule was discharged and the defendant appealed.

Hennen, for appellant, made the following points:

1. Payment was not demanded at the counting-house of *M. White*, the place appointed for payment.
2. Because payment could not have been legally made, nobody having been authorized to receive it.

M^r Caleb, for appellee, contra:

1. It was not necessary for plaintiff to have alleged or proved that demand of payment was made at *M. White's counting-house*.—*Chitty*, (*Edition* 1830,) 249, (*note* 2,) 259, (*note* 1.)

2. If such demand was necessary to be proved, the evidence upon record establishes the same. The attorney for plaintiff received the note from *White*, the agent; it had, therefore, been sent *there*, and it would be a *far fetched presumption*, that a note at *Maunsel White's counting-house* was not paid *because the note was not there to be given up*.—3, *Martin*, N. S. 433.

3. The defendant was amicably demanded to pay prior to the suit. This demand was in New-Orleans, and he now comes with a very bad grace to complain of want of demand. This amicable demand was made in person.

Martin, J., delivered the opinion of the court.

This is an action on a promissory note: there was judgment by default, and the defendant appealed after an unsuccessful attempt to have the judgment set aside.

The statement of facts shows the note was subscribed by the defendant. Two names appear before his, but the note is joint and several, and it was payable at the counting-house of *M. White*, who handed it to the attorney who brought the

present suit. Robinson, when called on by the attorney, said he would see White about it, and being asked for the money a second time, said he was the surety of Bynum, whose name is first on the note, and Bynum ought to pay it.

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There is no evidence of any demand at the place at which the note is payable; but the plaintiff's attorney has contended that his having received the note from White, is evidence of its having been in the possession of White for collection; and the presumption is strong, that White was not absent from his own counting-house, on the day of payment, and there could not be any necessity of his making a demand from himself; and the counsel has cited numerous authorities, to show there was no necessity for such a demand. In *Miller vs. Croghan*, 3 *Martin*, N. S. 423, we concurred, in the opinion of our learned brother, from whose judgment the present appeal is taken, that in the case of a note payable, at a particular place, a demand there was a condition precedent to the plaintiff's right of recovery.

We admitted, however, that there were many and very respectable authorities in support of the contrary doctrine; that it was a most controverted question, and we gave that judgment which, in our opinion, was called for, by analogy to principles and a greater weight of authority. Having settled the law, as far as it can be settled by a single decision, we have nevertheless reconsidered our decision; and it has not appeared to us that it ought to be disturbed.

It does not appear, at what time White received the note. The suit was not brought till eight months after the maturity of the note. It is true the defendant did not pretend he had called at White's counting-house, to pay the note, but he gave it as his opinion, that this was the business of Bynum the principal, rather than the defendant, who was only a surety. The note bears no date of the place where it was executed; the plaintiff resides in another State and the principal, it is said, on Red-River. Nothing shows the presence of the plaintiff, nor of any body authorized by him,

Demand of payment at a place designated by the note, is a condition precedent to a recovery on it.

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at the counting-house of White, at the period when the note became due. The only demand which is proved is not pretended to have been made at the place of payment. Had the note been endorsed by the plaintiff, or did it appear that White was authorized to receive its amount, we might then perhaps be authorized to inquire whether the presumption was not that he must have been in his own counting-house, at some period before he handed the note to the attorney; and whether, in such a case, there was any necessity for his making any demand, till somebody came in, from whom it might be made. But the possession of the note by White, does appear to have been for the purpose of handing it to an attorney, without being accompanied by any authority to receive payment. Had it been shown that he had the note on the day of payment, perhaps, the presumption might be that he had it for the purpose of receiving its amount, as it was payable at his house—but this is not very clear.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such a judgment as, in our opinion, ought to have been given below; it is ordered that there be judgment in favour of the defendant, as in the case of a non-suit, with costs in both courts.

BOCOD vs. JACOBS.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW ORLEANS.

A slave's misrepresentation of his own name and that of his master when arrested, is not a sufficient circumstance to imply the habit of running away from a single instance.

Circumstances posterior to the sale may have some weight in proving the existence of a previous habit; but the mere fact of running away after the sale, added to a single instance before, does not establish an anterior habit.

The vender is not affected by the assertion of his broker that the slave is a ~~Eastern~~ District, good subject. Such a character is not absolutely inconsistent with the circumstance of his having absented himself for a few days.

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This suit was brought to rescind the sale of a slave who, it was alleged, was in the habit of running away.

The evidence showed that the slave run away *once*, while owned by the defendant, but was apprehended in a few days and committed to jail. The sale to the plaintiff was effected through a broker, who represented the slave as a good subject. There was judgment for the plaintiff, and the defendant appealed.

M Caleb, for appellant, made the following points.

1st. The judgment below should be reversed, because there is no evidence to show a *habit of running away* prior to the sale.

2d. There is not one tittle of proof that the slave had ever absented himself *more than once* from his owner, previous to the sale to the plaintiff: the running away *once* does not constitute the habit.—*C. C.*

Canon for appellee.

Martin, J. delivered the opinion of the court.

The rescision of the sale of a slave is claimed by the vendee, on the ground that he was in the habit of running away before the sale, in the knowledge of the vender, who, nevertheless, alleged, as it is said, that he was a good subject.—The plea was the general issue, and the defendant is appellant, of a judgment of rescision.

The evidence is, that the slave ran away once while he was owned by the vender, and was absent a few days only. When he was arrested he gave to himself and his owner many names. Soon after the sale he ran away a second time. The vender's broker, when bargaining with that of the vendee, represented the slave as a good subject.

The plaintiff's counsel has relied on the case of *Sykes vs.*

Eastern District, *Allen, 2d Martin, N. S.*; and has cited *Syrey, Pothier* and *Toullier*.
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RECORDED
 VS
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A slave's misrepresentation of his own name and that of his master, when arrested, is not a sufficient circumstance to imply the habit of running away from a single instance.

Circumstances posterior to the sale may have some weight in proving the existence of a previous habit; but the mere fact of running away after the sale added to a single instance before, does not establish an anterior habit.

The vender is not affected by the assertion of his broker that the slave is a good subject—such a character is not absolutely inconsistent with the circumstance of his having absented himself for a few days.

We have a special provision in our Code by which this case must be determined.—*Civil Code*, 2505.

If a slave has run away *once*, he is to be considered as having the habit of running away, if he stay away *more than one month*: so if he absent himself *twice for several days*.

We do not think that the slave's misrepresentation of his own name and that of his master, is a sufficient circumstance to authorize us to imply the habit from a *single* instance.

Circumstances posterior to the sale may have some weight in the scale of evidence in determining on the existence of a *previous* habit; but we do not think that the *mere* fact of running away immediately after the sale, added to a single instance before, may be received as evidence of an anterior habit. It may be the consequence of the displeasure of being sold—of his dislike of the new owner.

Neither ought the vender to be affected by his broker's assertion, that the slave was a good subject. Giving him such a character is not absolutely inconsistent with the circumstance of his having once absented himself from his owner's house for a few days.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed: and proceeding to give such a judgment as, in our opinion, ought to have been given below, it is ordered, adjudged, and decreed, that there be judgment for the defendant, with costs in both courts.

JOHNSTONE vs. THOMPSON.

APPEAL FROM THE COURT OF THE PARISH AND CITY
 OF NEW-ORLEANS.

The general received opinion of the words *to abscond*, is the act of a person who leaves any particular place clandestinely, or of one who conceals or hides himself.

This action was instituted under the following circumstances:—The plaintiff having absented himself from the state, three of his creditors filed a petition for a forced surrender, under the allegation of his being an absconding debtor. His property was sequestered and deposited in the hands of the defendant, as syndic for the creditors. The plaintiff returned, and instituted this action for the purpose of annulling the proceedings of the creditors, and effecting a return of his property. The plaintiff adduced proof of his absence being merely temporary. The defendant gave in evidence the record of the proceedings in the forced surrender. There was judgment for the plaintiff, and the defendant appealed.

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M'Crady for appellant. *Preston* for the appellee.

THOMPSON, SYNDIC OF JOHNSTONE v. NEWTON ET AL.
SAME vs. ROWE ET AL.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.

These actions were instituted by the plaintiff, as syndic under a forced surrender, of certain creditors of J. G. Johnstone, to constrain the defendants to yield up, for the benefit of all the creditors, the proceeds of certain drafts, bills of exchange, &c. transferred to them by the insolvent, to the fraud of the creditors generally by such illegal preference.

It appeared in evidence that the defendants had received of the insolvent, on the eve of his absenting himself, divers drafts, &c. in order to protect the said defendants against their endorsements for him for near the amount received.

The case of Johnstone vs. Thompson, syndic, annulling the proceedings of the creditors and restoring the property, being introduced, the court below nonsuited the plaintiff in both cases, and he appealed.

Strawbridge and *M'Crady* for appellant.

1st. The court cannot, in this suit, set aside the judgment

Eastern District, in the suit for a forced surrender; that judgment must stand
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2d. The party is actually insolvent, and had absconded.

3d. The action in avoidance of acts in fraud of creditors, may be exercised either personally or as represented by a syndic; and as Johnstone is now a party, judgment will be given according to the proof.

Preston for the appellee.

1st. The evidence shows that Johnstone was not an absconding debtor, and so the parish judge has decided; the plaintiff, therefore, is incapacitated to sue as syndic.

2d. The appellees were not made parties to the failure, and are, therefore, not bound by the proceedings.

3d. The transfers by Johnstone were for a good and valid consideration, at the time.

Mathews, J., delivered the opinion of the court.

In the two first of these cases the plaintiff, as syndic, claims from the defendants certain properties, rights and credits which, he alleges, were transferred to them by the insolvent, at an improper time and out of the ordinary course of business, to the injury and in fraud of the rights of the mass of creditors. The last suit is brought by the debtor, whose property was placed in the possession of the syndic, under a forced surrender, to cause to be annulled the proceedings by which his commercial books and other effects were transferred to the defendant as syndic, and to have them restored to him.

The proceeding which gave rise to these suits, was commenced in pursuance of the sixth section of an act of the legislature, passed in 1826, entitled "An act supplementary to an act relative to the voluntary surrender of property, &c." It is expressed in the following terms: "If any merchant or trader abscond or conceal himself, in order to avoid

the payment of his debts, it shall be lawful for three of his creditors, or more, to apply to any competent judge, &c. to obtain from the said judge an order authorizing the sequestration of the property of the said merchant, trader, &c."

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The proceedings in the case prosecuted under this section of the act ended in the sequestration of Johnstone's property, a forced surrender, and appointment of a syndic. Afterwards the debtor appeared; brought suit, as above stated, alleging their illegality, and consequent nullity, as being unfounded in fact; and claims restitution of his property.

The evidence adduced in the different cases, which is made applicable to all, shews clearly that the plaintiff in the last action was in insolvent circumstances at the time he left the state, in July, 1830. But the court below seems to have been of opinion that the fact of his absconding, or concealing himself, was not established by satisfactory testimony, and gave judgment in his favor, and also judgments against the syndic in his suits against Newton and Co., and Row and Went; from all of which he appealed. The judge *a quo*, we think, proceeded regularly in first taking into consideration the case of Johnstone vs. Thompson; for the decisions in the other cases may be viewed as corollaries of the judgment proper to be rendered in this.

The sequestration and forced surrender were based on the belief that the debtor absconded, or concealed himself, in order to avoid the payment of his debts. The main attempt, on the part of the creditors who provoked this surrender, as appears by the testimony of the cause, was, to prove an act of absconding according to the true intent and meaning of the law. But in this, we are of opinion with the court below, they have failed. The general-received meaning of the word *to abscond*, we believe to be the act of a person who leaves any particular place clandestinely, or of one who conceals or hides himself. According to the latter signification, which appears to be that accorded to it by lexicogra-

The general received opinion of the word *to abscond* is the act of a person who leaves any particular place clandestinely, or of one who conceals or hides himself.

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phers, it is synonymous with the word *to conceal*, and, consequently, the same effect should be given to the section of the law under consideration, if only one of the words had been used by the legislature.

The testimony affords no evidence of concealment, nor of clandestine departure from the city. Nothing shews that the debtor did not lay himself open to arrest in the ordinary mode of proceeding, by civil process, to the very moment of his departure. He went openly on board the steam boat which was about to take him from the country, and was seen there by a great number of persons. * To those with whom he had conversed on the subject of his going, he represented as a reason for taking that step, the dulness of business in New Orleans at that time, and the probability of its being so for some succeeding months of the year; that his intention was to return, having a prospect of obtaining a place as book-keeper with some merchant in this place.

That he had failed in business on his own account, cannot be doubted, according to the evidence; and that he adopted measures to secure his friends, who had assisted to set him up, is, perhaps, equally clear. The morality of such conduct, *in foro consciencie*, is not for us to investigate: it is believed to be contrary to our municipal regulations, and thus far may be considered as immoral. But it does not appear that he acted in such a manner as to authorize a sequestration and forced surrender of his estate, by absconding or concealment, in terms of the law. This case differs little from that of *Kennedy & Duchamp vs. Devlin*.—8. N. S. p. 150.

It is therefore ordered, adjudged, and decreed, that the judgments of the Parish Court rendered in these several cases be affirmed, with costs.

PRITCHARD ET AL. vs. LOUISIANA STATE BANK.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where the Bank undertakes the collection of a note, it becomes the agent of the depositor, and if the notary employed to protest the note, for non-payment, fails to give legal notice of protest to the endorsers, in consequence of which they are exonerated, the bank is liable for the neglect and bound to pay the amount of the note to the person depositing it for collection.

But where an agent becomes liable to pay the amount of a note, in consequence of neglect to give legal notice of protest, he is entitled to have the note, with all the remaining rights of the creditor, transferred to him.

This was an action upon a contract of agency, to obtain an indemnity from the agents, for a loss arising from their negligence. The negligence charged, was the omission to give to the endorsers due notice of the dishonour of a note. The evidence adduced on the trial is correctly stated in the opinion of the court delivered by

Martin, J.

The plaintiff seeks remuneration for a loss which he alleges he has sustained through the neglect of the defendant's agent, in giving notice on the protest of a note, deposited with the defendants for collection. They pleaded the general issue. The plaintiffs had judgment for costs incurred in prosecuting one of the parties on the note, and appealed.

There were four endorsers on the note, when it came to the plaintiff's hands—Lawrence, Chambers, Scott, and Hamilton.

The evidence shows that the plaintiffs brought a suit against the two last endorsers, and failed against one, because he relied on the notary's certificate, which did not state the post-office in which the notice was put. *Pritchard vs. Hamilton*, 6 *Martin*, N. S. 456; against the other, because the notice had been left in the post-office at Baton-Rouge—an office to which the endorser was in the habit of sending for his letters and papers.—*Pritchard vs. Scott*, 7 *id.* 491.—Of the two other endorsers, one of them has removed

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out of the State, and the notice to the other is liable to the same objection as that to Scott.

The district judge appears to have been of opinion that the plaintiff had not shewn that he sustained any damage, beyond the amount of the costs, in the suits against two endorsers. He gave judgment therefor, and reserved to the plaintiff his right of recovery for such damages, as he might show to have finally resulted from the neglect of the bank or its agent.

We think he erred. The plaintiff clearly shows he failed to recover against Scott, and he is unable to recover from Chambers, because the legal notice was not given to either of them, and his recovery against Chambers has become, at least, more difficult, by the removal of Chambers out of the State. He had the security of four endorsers; it is clear he has lost that of two, by the neglect of the bank. This loss is certainly an injury for which he has a right to a compensation. Had the bank given due notices to these two endorsers, it is clear the plaintiff would have obtained judgment against them, and very probably his money, and he would not be subjected to the risk, delay, and inconvenience of sending his note to a distance, to have Chambers sued on.

Where the bank undertakes the collection of a note, it becomes the agent of the depositor, and if the notary employed to protest the note for non payment, fails to give legal notice of protest to the endorsers, in consequence of which they are exonerated, the bank is liable for the neglect and bound to pay the amount of the note to the person depositing it for collection.

But where an agent becomes liable to pay the amount in consequence of neglect to give legal notice of protest, he is entitled to have the note, with all the remaining rights of the creditor transferred to him.

But the counsel of the bank urges that on payment of the amount of the note, the bank ought to be entitled to all the plaintiff's rights and claims thereon; that owing to the neglect of the plaintiff, or of his attorney, his right on Hamilton is lost, there being judgment in favour of the latter.

It appears the attorney depended for proof of notice, on a notary's certificate, evidently defective on its face, while the defect might have been cured by the examination of the notary as a witness;—be that as it may, the plaintiff was only bound to transfer his rights to the bank, on receiving payment. The loss of the recourse on Hamilton, is not proven, for it is not shown that the testimony of the notary could have prevented it, and, if it was, it is far from being

clear that the defendants, on paying damages, would not be obliged to be satisfied with a subrogation of the plaintiff's rights, as existing at the time of payment, even if diminished by the neglect of his agents, provided they were not so by fraud.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding to give such a judgment as, in our opinion, ought to have been given below, it is ordered, adjudged and decreed, that the plaintiff recover from the defendants the sum of fifteen hundred and seventy-seven dollars and ninety-two cents, with interest at the rate of five *per cent.* from the date of the protest, and the further sum of ninety-four dollars and fifty cents, for his costs in the two suits brought against the endorser, with costs in both courts. But execution is not to issue on the judgment till the plaintiff shall have delivered to the defendants, or deposited in the office of the clerk of the District Court, the note mentioned in the petition, together with a cession or transfer of all his rights thereon.

RUSSELL ET AL. vs. BUCKLES—GALE INTERVENING.
APPEAL FROM THE DISTRICT COURT FOR THE FIRST
JUDICIAL DISTRICT.

Where mutual accounts exist between the consignor and consignee, the latter has no lien upon the goods attached in his hands, unless there be proof of a balance in his favour at the time of the attachment.

The plaintiff, in this case, attached 250 coils of bale rope, alleging it the property of J. C. Buckles, a non-resident. L. H. Gale, the consignee of the rope, intervened, alleging a lien on it for balances, no liquidation of accounts was shewn, leaving a balance in favour of Gale, at the time of

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the attachment. There was judgment for the plaintiff, and the intervening party appealed.

Hennen, for appellant.

1. The consignee has a privilege on the goods consigned for his advances, even before their arrival, if a bill of lading has been despatched to him.—*C. C.* 3214.—*Code de Commerce*, 93.—*Dufour's Code de Commerce*, vol. 1, page 112.—*Delvencour Droit Com.* 1, p. 53.

2. The consignee's privilege attaches from the day the goods leave the store of the consignor.—*Pardessus*, v. 4, p.

357-8.

Martin, J., delivered the opinion of the court.

This is an attachment case. Gale intervened and claimed a quantity of bale ropes, part of the property attached, which had been consigned to him by the insolvent, who was indebted to him. His claim was disallowed, and he appealed.

The district judge concluded from the evidence that the consignor and consignee made mutual shipments to each other. Their accounts were unliquidated at the time of the shipment: the evidence does not show on whose side the balance was.

The counsel for the intervening party has urged in this court, that the consignee has a privilege on the goods consigned, for his advances, even before their arrival, if a bill of lading has been dispatched to him.—*Civil Code*, 3214.—*French Code of Commerce*, 93.—1, *Dufour on Code de Commerce*, 112.—1, *Delvencourt Droit de Commerce*, 53.

Where mutual accounts exist between the consignor and consignee the latter has no lien upon the goods attached in his hands, unless there be proof of a balance in his hands at the time of the attachment.

—The consignee's privilege attaches from the time the goods came into the consignor's store.—4, *Par.* 357-8.—1, *Loce*, 467.—Without admitting or denying the doctrines contained in these authorities.

The plaintiff's counsel has relied on the absence of any proof of a balance in favour of the intervening party, at the time of the attachment.

On an attentive examination of the evidence, it has not appeared to us the District Court erred. Eastern District
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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs. RUSSELL ET AL
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BENNETT ET AL. vs. ALLISON.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

In a suit upon a note the plaintiff is not bound to prove the defendant's signature, unless it be expressly denied; but if neither the allegations in the petition nor interrogatories annexed thereto require such denial or admission, then every means of defence is open to the defendant, under a plea of the general issue.

Solidarity in obligations must be express, except in the case of commercial partners.

Where one of the joint obligors of a note given by a *particular partnership* fails, and places the payee as a creditor on his *bilan* for the *whole amount*, he is nevertheless liable but for half.

This suit was brought on a promissory note, in the following words:—"Three months after date, we promise to pay William Bennett and Hugh Grant, or order, four hundred and twenty-one dollars and sixty-six cents. Value received." Signed "Allison & Rowe." Suit had been previously brought against Thomas Roe, one of the drawers, and judgment rendered in favor of the same plaintiffs for the amount of the note; Allison having obtained a stay of proceedings and respite. His respite having expired, this suit was brought against him. Having pleaded a general denial, the signature of the note was proved to be in his handwriting. On the trial the defendant offered evidence that the firm of Roe & Allison was a particular partnership; to which evidence the plaintiffs objected on the ground that the fact was not pleaded, and that the defendant's signature to the note having been denied and proved, no evidence could be received in defence. The court admitted the evidence. The *particular* drawers of the note were proved to have been partners as builders; and the court charged the jury that the plaintiffs could recover but half the amount of the note. They found

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accordingly; and from the judgment on their verdict the plaintiffs appealed.

*Preston* for appellant.

1st. The district judge erred in the opinions excepted to. The answer admitted no special defence.—*C. P.* 326, 326.

2d. The words of the note sued upon create an obligation *in solido* on the part of Roe & Allison.—*C. C.* 2077.

*Mathews, J.* delivered the opinion of the court.

This suit is founded on a promissory note, which purports to have been made by the defendant jointly with a person of the name of Roe.

The answer to the petition is a general denial. It does not appear that the defendant was called upon to acknowledge or deny his signature, according to the 323d article of the Code of Practice; nor is there any specific allegation that the note was signed by him, in pursuance of article 324.

The plaintiff proceeded to prove the signature, under the general denial; and then claimed a right to enforce the disabilities imposed on defendants who have expressly denied their signatures, by articles 325 and 326; alleging that, according to these articles, the defendant was barred from every other species of defence.

The defence offered was, the want of *solidarity* in the obligation of Allison & Roe, supported by proof that their partnership was particular, and not commercial.

A jury, to whom the cause was submitted, found a verdict for one-half of the sum specified in the note, under a charge from the court; and from a judgment rendered in pursuance of this finding, the plaintiffs appealed.

A construction has already been given to the articles of the Code of Practice invoked in the present case, by which it appears that a defendant ought not to be precluded from other defences, unless by the petition and answer he be brought precisely under the disabilities imposed by a strict

pursuit of the law, which did not occur in the present case. Eastern District,  
—See 8 N. S. p. 297. May 1831.

The defendant not having expressly denied his signature or execution of the note, the plaintiff was not bound to prove these facts. If it be granted that the petition is made in such terms as to require of him an express and specific admission or denial;—if neither the allegations in the petition, nor interrogations annexed thereto, required such denial or admission; then every means of defence remained open to the defendant, under a plea of the general issue.

It is a matter so well known, that according to our law *solidarity* in obligations must be express, that we deem it useless to cite any authorities to this effect. The only case recollected in which it takes place without express stipulation, is that of commercial partners.

But admitting the truth and correctness of these doctrines, it is contended for the plaintiffs, that Allison assumed to pay them the whole amount promised in the joint note of him and Roe, by placing them on his schedule as creditors to that effect, in his application for a respite, sanctioned by his oath. The oath annexed to the schedule declares that it contains a true and exact account of his property, as well as of his creditors. By placing himself as debtor to the plaintiffs for the entire sum expressed in the joint note of him and Roe, he could not preclude them from pursuing Roe for the one-half, which he was legally bound to pay; nor could this circumstance have prevented the mass of his creditors from contesting Allison's liability for more than half that sum. We are of opinion that the bare circumstance of placing the debt in this manner on the bilan of the debtor, produced no alteration in his legal obligations arising from the joint note of him and Roe.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

BERNETT ET AL  
vs.  
ALLISON.

In a suit upon a note the plaintiff is not bound to prove the defendant's signature unless it be expressly denied; but if neither the allegations in the petition nor interrogations annexed thereto require such denial or admission, then every means of defence is open to the defendant under a plea of the general issue.

*Solidarity* in obligations must be express, except in the case of commercial partners.

Where one of the joint obligors of a note given by a particular partnership fails, and places the payee, as a creditor on his *bilan* for the whole amount, he is nevertheless bound but for one half.

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May 1831.

COX  
vs.  
WHITE.

COX vs. WHITE

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

An attachment will lie against the incorporeal rights and credits of a debtor in the hands of garnishees, although it be sued out after transfer of such rights and credits to a third person, when no notice of such transfer had been previously given to the debtor.

The irregularities of such a proceeding by attachment which has progressed to final judgment, cannot be enquired into in a subsequent suit by a new plaintiff, to recover the property attached. The judgment in attachment forms *res judicata* between the parties, and cures all irregularities when not appealed from.

The tradition and not the naked consent of parties, is necessary to transfer the dominion of property. But as an actual delivery of rights and credits or of incorporeal objects, cannot be made, the transfer, to affect third persons, must be made by delivery of the title or evidence of the debt, and notice to the debtor.

It is a principle of the laws of this state, that the property of debtors is always held liable to their creditors until a full and complete transfer and tradition is made to the purchaser.

In October, 1826, the defendant sued out an attachment against the property of Joshua Cox, a nonresident, which was levied on certain incorporeal rights and credits, in the hands of Carleton & Lockett, attorneys of Joshua Cox, by giving them notice of the attachment. They appeared as counsel for the absent debtor, against whom judgment was rendered, and execution levied on the same rights and credits, in April, 1830.

Previous to the attachment, to-wit, in September, 1826, the firm of Banks, Miller & Kincaid, who were the depositaries of these rights, had been directed by Joshua Cox to transfer them to the plaintiff; but no notice of this transfer was given to the debtors of Cox till 1829, nor had the defendant any knowledge of it prior to the service of the attachment.

This suit was brought to recover these claims, as having been transferred to the plaintiff previous to the attachment. The court below gave judgment for the defendant, and the plaintiff appealed.

*Conrad*, for appellant, made the following points:

1st. None of the rights and credits in controversy have ever been legally attached in the suit of *White vs. Cox*. Service of the writ of attachment on Carleton & Lockett was not sufficient to give any right to said credits.

2d. Even if the rights were legally attached in said suit, the transfer of the same to the plaintiff was complete before said attachment.

*M Caleb* contra:

1st. The service on Carleton & Lockett was good.

2d. No subsequent act of Joshua Cox, or those indebted to him, could divest the defendant of his lien on these rights and credits.

3d. That the return of the service on Carleton & Lockett shews what these rights and credits were, and that they had given notice to Hunter, one of the debtors of Joshua Cox.

4th. That the levying of the attachment was prior to the notice of the assignment to the plaintiff, the claimant in this case.

5th. That the plaintiff, who claims by assignment, should have proved notice of it to the original debtors, and also to Carleton & Lockett, who had the legal control of the evidences of these claims.

*Mathews, J.* delivered the opinion of the court:

This suit is brought to recover certain rights and credits which were attached by the defendant as the property of one Joshua Cox, and on which attachment a judgment was obtained, and execution subsequently issued and was levied on the attached property. The plaintiff claims these rights and credits by transfer from Banks & Kincaid, made by and with the consent of Joshua Cox, the owner. There was judgment in the District Court for the defendant, from which the plaintiff appealed.

The material facts of the case, as gathered from the testimony and documents, are the following: In the year 1826,

Eastern District,  
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COX  
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An attachment will lie against the incorporeal rights and credits of a debtor in the hands of garnishees, although it be sued out after transfer of such rights and credits to a third person, when no notice of such transfer has been previously given to the debtor.

The irregularities of a proceeding by attachment which has progressed to final judgment, cannot be enquired into by a subsequent suit by a new plaintiff to recover the property attached. The judgment in attachment forms *res judicata* between the parties, and cures all irregularities when not appealed from.

White, the present defendant, sued out an attachment against the property of Joshua Cox, and summoned Carleton & Lockett, practising attorneys in this city, as garnishees, to declare on oath what effects they had in their possession of the defendant in the attachment. They acknowledged that there were in their hands sundry notes on various persons in the state, placed with them for collection by the defendant; and also that they had obtained for him a judgment in the District Court of the United States against persons named Wilkinson & Hunter. The sheriff made a return as having seized these rights and credits in the hands of the garnishees. The attachment suit was proceeded in up to judgment, defended by these gentlemen as attorneys for the absent debtor. No objection was made during the trial to the regularity or validity of the levy made under the attachment, as above stated. Previous to its execution, the same rights and credits had been transferred to the present plaintiff; but no notice of this transfer was made to the debtors of Joshua Cox until the year 1829; nor had the attaching creditor any knowledge of it previous to the commencement of his suit.

Objections are made in the present case to the regularity and legality of the proceedings in the attachment, which, if it were by appeal, or in any other legal shape now before this court, would perhaps be entitled to great weight.

The judgment therein rendered must be considered as *res judicata* between the parties, and as having settled all disputes between them in relation to the property attached, however irregular the proceeding may have been. All defects in the commencement and prosecution of that suit, must be viewed as cured by the final judgment, in relation to all parties who had no complete and vested rights in the property attached, at the time of rendering it. The only question in the present case, as it appears to us, relates to the ownership of the plaintiff in the rights and credits of Joseph Cox, at the period when they were attached by the defendant. If a property in them, full and complete according to



our laws, had vested in him prior to the attachment, then they are not liable to be seized in execution and sold to satisfy the judgment obtained by White against Joseph Cox.

It has been long a settled doctrine of our jurisprudence that tradition, and not the naked consent of parties transfers the dominion of property. It is true that, in relation to the transfer of rights and credits, which are incorporeal, no actual delivery can take place. But our law, as an equivalent for real tradition, requires certain formalities to be performed, in order that the transfer may affect third persons: such as a delivery of the title or evidence of the debt, and giving notice to the debtor, &c. (*See La. Code, art. 2612 & 2613.*) In this case it does not appear that any of these formalities were fulfilled by the plaintiff until long after the judgment was obtained by the defendant on his attachment. The former has not succeeded to shew that he was legal proprietor of the effects attached; previous to the judgment which subjected them to the claim of the latter under his judgment obtained against Joseph Cox, the original owner.

A question was raised, and slightly commented on during the argument of this cause, as to those who should be considered third persons according to the articles of the Code above cited. The counsel seemed to think that these expressions should be limited to subsequent transferees alone. It seems, however, to be in accordance with the spirit of our laws to hold the property of debtors always liable to their creditors until a full and complete transfer and tradition of it is made to *bona fide* purchasers; and in conformity to this spirit, the decisions of our courts have uniformly been, whenever the truth could be discovered. On this subject we have a very strong expression in our Code; which considers the property of a debtor as holden in pledge for his creditors.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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COX  
vs.  
WHITE.

The tradition and not the naked consent of parties is necessary to transfer the dominion of property. But as an actual delivery of rights and credits or of incorporeal objects cannot be made, the transfer, to effect third persons, must be made by delivering of the title or evidence of the debt and notice to the debtor.

It is a principle of the laws of this state, that the property of debtors is always held liable to their creditors until a full and complete transfer and tradition is made to the purchaser.

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GOMEZ  
vs.  
RAMOS.

GOMEZ vs. RAMOS.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF  
NEW-ORLEANS.

Where three individuals composed a partnership in a bakery, and two of them by a written document (before the dissolution of the firm), acknowledged a stated amount due to the third—if this document be transferred by the latter, the transferee cannot plead it in compensation of a debt which he owes to one of the two partners.

The defendant, Gomez, being sued on an account, offered in compensation an obligation, transferred to him by Cajegal, a former partner of the plaintiff.

This document, which was signed by the plaintiff and other partners, certified that Cajegal had a share or interest to the value of \$402, in a certain bakery, its utensils and management. The plaintiff had judgment for the amount claimed, and the defendant appealed.

*Martin, J.* delivered the opinion of the court.

The defendant and appellant complains of the judgment, which rejects his plea of compensation.

This plea was grounded on the transfer of a document (to the defendant by Cajegal,) by which it appears that the transferor, the plaintiff, and a third person, being partners in a bakery, the two latter acknowledged they had settled an account with the former, whereby a balance was in his favour, on the close of a period, during which he had carried on the bakery for the partnership, stating that balance, with his interest in the bakery, amounted to four hundred and odd dollars.

Where three individuals composed a partnership and two of them by a written document, before the dissolution of the firm, acknowledged a stated amount due to the third; if this document is transferred by the latter the transferee cannot plead it in compensation of a debt which he owes to one of the two parties.

We think the parish judge did not err—the two partners did not engage to pay that sum to the transferor; it does not appear that the partnership expired or was dissolved, but rather that it continued. The document shows only that, at its date, the transferee was in advance to the partnership, and that his advances and his interest in the partnership amounted to the sum stated.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs in both courts.

## OF THE STATE OF LOUISIANA.

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*LOZE vs. MAYOR, ALDERMEN, ET AL.*

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### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

An ordinance of the city council is binding although it be promulgated in the French language only.

LOZE

vs.

MAYOR, ET AL

The plaintiff was farmer of the taxes on drays, carts, and other vehicles, imposed by an ordinance of the city council, promulgated in French only.

As farmer he prosecuted various delinquents, and failed. He instituted this suit for indemnification. There was judgment for the defendants, and the plaintiff appealed.

*Seghers* for appellant.

No law is binding on the public unless it be published both in the English and French languages.

*Martin, J.*, delivered the opinion of the court.

The plaintiff, farmer of the collection of certain taxes imposed by ordinances of the city council, was cast in several actions for the recovery of these taxes, on the pleas of the defendants that they could not be bound to pay taxes imposed by ordinances of the city council promulgated in the French language only; and those under which he claimed not having been promulgated in any other manner, he appealed to the City and Parish Court, in which he was assisted by the counsel of the city, and the judgments were confirmed.

He brought the present suit for relief, and is appellant of the judgment of the District Court, which decides that such ordinances are binding, though they be not promulgated in the language in which the constitution of the United States is written.

It does not appear to us the District Court erred. The constitution of this state has, indeed, prescribed the use of the national language in the promulgation and preservation of all laws that may be passed by the legislature, the public records of the state, the legislative and judicial written proceedings of the same.—Sect. 5.

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LOREN  
vs.  
MAYOR, ET AL.

An ordinance of  
the city council is  
binding although  
it be promulgated  
in the French lan-  
guage only.

We are of opinion that this constitutional provision cannot, without too forced a construction, be extended to the by-laws and ordinances of corporations. Whatever force and effect such by-laws and ordinances may have, they are not laws passed by the legislature of the state. In the case of the Police Jury vs M'Donough, we held that the proceedings of police juries did not come within the provisions of the constitution; and the present case cannot be distinguished from that.

The defendants were not parties to the suit in which the present and then plaintiff failed, from the circumstance of his not being entitled to an appeal from the Parish Court. The circumstance of the city having afforded him the aid of their counsel, does not render the decision *res judicata* against it.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

#### PERRILLAT vs. PUECH.

#### APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW ORLEANS.

The plea of *res judicata* is not sustained by a judgment of non suit.

An action for the repayment of money obtained under an unlawful agreement is not barred by the 3501 article of the Code in relation to *quasi* offences.

A contract by which usurious interest is exacted and paid, is in compliance with a natural obligation, and cannot be recovered back. Such a contract is not *malum in se*, but *malum prohibitum*.

The object of this suit was to compel the defendant to refund money, which the plaintiff alleged he had paid him at an usurious rate of interest. The defendant excepted to the petition, on several grounds which are stated in the opinion of the court. The court below sustained one of the exceptions, and the plaintiff appealed.

*Lockett*, for appellant.

*Dennis*, for appellee.

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| 21  | 428 |
| 104 | 42  |
| 2   | 430 |
| 110 | 902 |
| 2   | 428 |
| 116 | 486 |

Porter, J., delivered the opinion of the court.

This action is brought to recover from the defendant the sum of twelve hundred and nineteen dollars, which the plaintiff alleges he paid him for money lent at an usurious rate of interest.

The defendant pleaded as exceptions to the action :

1. The authority of the thing judged.
2. The prescription of one year as established by the 3501st and 3503d article of the Louisiana Code, and
3. That the money was paid in compliance with a natural obligation, and could not be recovered back.

The court below sustained the second exception, and the plaintiff appealed.

The first is unsupported by any evidence. The judge below refers to a case between the same parties, once decided in this court. Taking that to be the decision on which the defendant rests his plea of *res judicata*, it, by no means, supports it, for the judgment rendered here was not final, but one of non-suit.—8, *Martin*, N. S. 671.

The judge of the first instance was of opinion that this action was barred by the 3501st article of our code, in relation to *quasi* offences: we are unable to agree with him. The injury complained of in the petition arose out of a contract. [ *Quasi* offences are those by which an injury is done independant of any agreement. The 3503d article relied on, in the answer, provides for cases quite different from the present. The demand here is neither for the arrearages of rent charge, annuities, and alimony, or for the hire of immoveables, or moveables, or for money lent: it is for the repayment of money obtained under an unlawful agreement.

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vs.  
PUECH.

The plea of *res judicata* is not sustained by a judgment of non-suit.

An action for the repayment of money obtained under an unlawful agreement is not barred by the 3501 article of the code in relation to *quasi* offences.

The third exception presents much more difficulty than the others.

The 1751st article of the Louisiana Code, divides natural obligations into four kinds, and under the first head classes those " which are invalid for the want of certain

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PUNCH.

forms, or for some reason of general policy, but which are not, in themselves, unnatural or unjust.

The 1752d declares that although natural obligations cannot be enforced by an action, yet among their effects one is, that no suit will lie to recover what has been paid, or given in compliance with a natural obligation.

By the 2284th, it is provided, that the payment from which we might have been relieved by an exception that would extinguish the debt, affords ground for claiming restitution.

But the article which follows that just cited, limits this exception to those which would extinguish all natural obligation.

Were it not for the definition given to the natural obligation, in the 1751st article, we should have had great difficulty in deciding this cause. At the time this contract was entered into, the laws of Spain, in force in this State, had not been repealed. By them, contracts, beyond the legal rate of interest, were void. And although one does not readily perceive any difficulty, in saying that if there was no law prohibiting taking interest at a certain rate, the promise to pay it is not only a natural obligation, but one which might be enforced in a court of justice; yet when the law has pronounced a contract null and void, it would seem that an agreement entered into in violation of it, ought not, and could not produce any effect. Pothier, who seems to have had a strong abhorrence of usury, after stating that it is prohibited by both divine and human laws, quotes the maxim of the Roman Code: *Pacta quæ contra leges fiunt, nullam vim habere, indubitatè jûris est*, and then states that an agreement to pay more than the legal rate of interest, produces no obligation, not even a natural one.—*Pothier, Traité du prêt à usage et du précaire, No. 111.*

Under the present jurisprudence of France, the lender who pays interest which is not due, cannot compel the

repayment, but some think that if the amount is beyond the legal rate, he may.—*Code Nap.* 1906.—In England money paid under usurious contracts can be recovered.—*Douglass' Reports.*

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To return, however, to our statutory provisions, by which the case must be decided, they declare that money paid under natural obligations, cannot be recovered; and they define as natural obligations those which are not immoral or unjust, but which may be rendered invalid, from some reason of general policy.

Under which class does the contract, to obtain more than the legal rate of interest, fall? Were we to follow the opinions of Pothier, it would be stamped with turpitude of the grossest kind; but since he wrote we believe different views on this subject pervade the civilized world. Many think that not only it is not immoral to take as high a rate of interest as the lender can obtain, but that it is impolitic to prevent him doing so. Others think differently. But we believe that those who desire to repress the practice are moved more by views of public policy, than a belief that the obligation has no force as a natural one. Indeed the prohibition of the contract by name is an expression of the legislative understanding, that, without such prohibition, it would be binding. Were it one immoral in itself, it would have fallen under the general declaration that contracts contrary to *bonos mores* are void; and special legislation in regard to it was unnecessary. We are of opinion that the prohibition in relation to taking more than a certain rate of interest for money, is founded upon motives of public policy, and not because the contract is immoral. In other words, that it is not *malum in se*, but *malum prohibitum*, and that, therefore, the exception must be sustained.

A contract by which usurious interest is exacted and paid, is in compliance with a natural obligation, and cannot be recovered back. Such a contract is not *malum in se* but *malum prohibitum*.

It is consequently ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

*The defendant*  
*vs. the plaintiff*

Eastern District, *ARANZAMENDI ET AL. vs. LOUISIANA INSURANCE COMPANY.*  
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ARANZAMENDI  
ET AL.  
vs.  
LA. INSUR. CO.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The terms in a policy of insurance, "free from average unless general," are convertible with those of "total loss," and to enable the assured to recover there must be a total destruction of value. Whether a total physical destruction? *Quere.*

The preservation of the thing insured up to the time of its arrival at an intermediate port and sale there, produces the same effect as a sale at the terminus, unless it be shown the cargo could not be carried there, without a total loss being the inevitable consequence.

Where the insured by the terms of the policy take on themselves all risks, excepting a total loss of the thing insured, a partial destruction of the object at an intermediate port does not discharge the warranty.

The circumstance of the ship being a general one makes no difference in cases of this kind.

The facts are fully stated in the opinion of the court, delivered by

*Postor, J.*

This is an action on a policy of insurance, by which the defendants insured fifty hogsheads of tobacco on board the brig *Sally-Ann*, on a voyage from New Orleans to St. Johns, in Porto Rico, with liberty to touch at St. Thomas. By a memorandum annexed to the policy, the tobacco is warranted free from average, unless general.

The vessel, a short time after her departure from the port of Orleans, sprung a leak, and put into Pensacola in distress. While there a survey of the port-wardens was called, who ordered a part of the cargo to be discharged, to see if the leak could be discovered. In taking out the cargo, it was ascertained that twenty-three hogsheads of the tobacco were greatly damaged. They were ordered to be sold at public auction, and brought the gross sum of \$519 25. Charges of various kinds reduced this amount to \$355 84.

The brig remained a considerable time in this port, and, after having repaired the damages she had sustained, proceeded on her voyage. She again encountered bad weather, and finally reached St. Thomas on the 15th September.



The remaining twenty-seven hogsheads of tobacco were landed there, and a survey called on them. They were found damaged by sea-water, and a sale of them was recommended. They were sold at public auction, and the net proceeds of the sale were \$451 43.

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The cause was submitted to a jury in the court below, who found a verdict for the plaintiffs. The judge confirmed it, and refused to grant a new trial. The defendants appealed.

The terms used in the policy, "free from average, unless general," are understood to be convertible with total loss; and under such a warranty by the insured, the law is perfectly settled in the United States, that there must be either a total physical destruction of the object insured, or a total destruction of value. Some of the cases, indeed, go so far as to require the former. But that now before us renders an opinion on this point unnecessary. It is too late to inquire into the reasons on which this rule is founded: the doctrine received a full discussion in this court, in the case of *Brooke vs. Louisiana State Insurance Company*. In our judgment, the construction put on the terms used in this policy by the English courts, is more consonant to reason, and to the supposed intention of parties *antecedent to any judicial decision*, than that universally adopted in the United States. But we yielded our opinions to the conviction, that the law was otherwise settled in this country, and that it was our duty to conform to it. After a determination so solemnly made, we cannot now retrace our steps. Parties are presumed to have shaped their contracts according to the law as it was understood and pronounced by the court. The inconvenience of the rule is nothing, when weighed with that which would result from unsettling it. A greater evil cannot be well inflicted on a community, than that produced by courts of justice receding from general rules, to meet their views of policy or equity. It has been argued in this case, that the rule being arbitrary and inequitable, it should be extended no

The terms in a policy of insurance "free from average unless general," are convertible with those of "total loss," and to enable the assured to recover, there must be a total destruction of value. Whether a total physical destruction? Query.

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further than adjudged cases have already carried it. We think, on the contrary, that the rule must be applied, like every other rule, first to the case for which it was made, and then to all others which fall within the reason and principle on which it was established.

From the facts already stated, it appears there was neither an absolute physical destruction of the object insured, nor a total loss of the value. The thing continued to exist after the damage was sustained, and it sold for a sum exceeding \$800, deducting all charges.

The appellees have endeavored to take this case out of the general rule, on these grounds:—1st. Because the property was lost before the ship reached the port of destination. 2d. Because it was so damaged that it could not be carried without imminent danger to the lives and health of the officers and crew; and that as they would have been justified in throwing it overboard, the rights of the insured cannot be impaired by their selling it. As the last point is connected with a bill of exceptions taken on the trial, we will examine it first.

When the cause was before the jury, the plaintiff's counsel requested the court to charge them, that if they believed the tobacco was in so putrid and corrupt a state from sea-damage, that it could not be transported to Porto Rico without imminent danger to the health of the crew, the captain was not bound to transport it there, and in that case the loss must be total. This was objected to by defendant's counsel, but the court overruled the objection, and charged the jury as requested; whereupon the defendants accepted.

Whether the court was correct, or not in the expression of this opinion to the jury, we need not stop to inquire; because the case before us for decision is not the case put in the bill of exceptions. The captain did not throw the tobacco overboard, but sold it at intermediate ports. No such reason as that now set up is assigned in his protests, nor is there a tittle of evidence that the health of his crew suffered by car-

rying a large portion of the property insured within ten hours' sail of the port of destination. What might have been the rights of the parties, if there had been an absolute physical destruction of the thing, from the cause mentioned, need not be examined, when, in consequence of a different course being pursued, there was neither a total loss in value, nor of species. The argument would be just as strong if the thing had reached the port of destination. The plaintiff, in that hypothesis, might say with equal force, "Pay me for a total loss, because I might legally have turned the injury I sustained into one." A preservation of the thing up to the time of its arrival at an intermediate port, and sale there, must have the same effect as at the *terminus* of the voyage, unless (in the most favorable point of view in which the law can be considered for the plaintiff) it is shewn the cargo could not have been carried there without a total loss being the inevitable consequence.—7 *East* 38.

This opinion disposes of the second ground taken by the plaintiff, and we proceed to the other.

The total loss of the property before the vessel reached the port of destination, would certainly form a proper ground on which the assured might claim indemnity; but in the instance before us there was not a total loss at the intermediate ports: on the contrary, it existed there in kind, and it was not without value. The attempt here is to turn a partial loss into a total loss, and, according to the rules established in the United States respecting memorandum articles, this cannot be done. (1. *Wheaton*, 225.) The insured runs on themselves all risks, excepting a total loss of the thing insured; and a partial destruction at an intermediate port does not necessarily discharge the warranty. The facts of our country are numerous to this point, and on facts not differing materially from these now before the court. In the present instance the cargo was not destroyed; it was only diminished in value. The facts would not even

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The preservation of the thing insured up to the time of its arrival at an intermediate port and sale there produces the same effect as a sale at the terminus, unless it be shewn the cargo could not be carried there without a total loss being the inevitable consequence.

Where the insured by the terms of the policy take on themselves all risks excepting a total loss of the thing insured, a partial destruction of the object at an intermediate port does not discharge the warranty.

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bring the plaintiffs within the English rule, as we understand it. There was neither a total loss of the whole cargo, nor of any particular portion of it;—the value of all and every part of it was merely diminished. In a late case before the King's Bench, where tobacco and sugar, insured free from average unless general, was injured by the wreck of the ship, after the risk had commenced, and before she reached her port of destination, but was saved in a very damaged state; Lord Ellenborough said, "If this can be converted into a total loss by abandonment, the clause excepting underwriters from particular average, may as well be struck out of the policy. We can only look at the time when the goods were landed, and then it was not a total loss, however unprofitable they might afterwards be." Bayley. Justice, observed, "The very object of this exception is to free the underwriters from liability for damaged goods. They say, in effect, that they will be liable if the goods are wholly lost, but not if they are only damaged." The case, lately decided in England, which is found in *5th Maule and Selwyn*, 447, cannot perhaps be reconciled entirely with that just quoted from East; but it was peculiarly circumstanced, and the latest writer of insurance in that country does not seem to consider it to establish a different rule. But even if it did, it is the law of England, and on this subject the law in the United States is perfectly settled.—16 *East*, 214. 14 *John*. 139. 1 *Wheaton*, 224—232. 3 *Caines*, 108. 15 *East*, 559. 3 *Kent's Com.* 247. *Hughes on Ins.* 280—282.

But, it is said, that if the property had not been sold at Pensacola and St. Thomas, it never could have reached the port of destination. Admitting this to furnish in law a ground for recourse upon the insurers, it is evidently one which must be received with great caution, and should be fully and clearly proved. It rests on conjecture and probability. In this case there is not even a presumption established that, such was the situation of the whole of the proper-

ty insured. In relation to that portion of the tobacco which was disposed of at Pensacola, the idea may have some plausibility; in respect to that sold at St. Thomas, not the slightest. It is proved the latter port is within ten or fifteen hours' sail from St. Johns, which is to leeward, in a latitude where the trade-winds prevail; and that vessels are usually plying between the ports. And there is nothing in the evidence to at all countenance the position of the tobacco being so much damaged when taken out at St. Thomas, that it could not have been transported in the same state to the port of destination.

Again. It was urged this was a general ship, and that no case could be found where damaged property was sold from such a vessel, at a place short of the port of destination, and the insurers were not held responsible. The cases decided in the United States make no such distinction, nor is any good reason perceived by us why it should be made. Either the condition of the property authorized the sale, or it did not. If it did, then the act of the captain was the act of the party who owned the property, at least, it will have the same effect; because the law sanctioned and authorized it. If, on the contrary, the situation of the tobacco did not authorize the sale, because it was not unsound or damaged, then the assured is discharged; because, the presumption is, it could have reached the place of destination. In the last supposition the act of the captain was an act of barratry; and if recourse is sought from the underwriters on that ground, it should have been alleged in the petition.

The influence due to the verdict of the jury has been strongly pressed on us. If the case turned on matters of fact alone, and the testimony was conflicting, it would deserve and receive all the influence to which counsel conceive it entitled. But the law, more than the facts, is the subject of contestation here. In relation to the latter we see no ground for a dispute. In such a case, and more particularly

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The circumstance  
of the ship being  
a general one  
makes no differ-  
ence in cases of  
this kind.

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where the judge charged the jury in such a manner as to lead them to believe that more weight was due to the right of the captain to throw the cargo overboard, than the fact authorized, the respect due to the finding is greatly diminished. We consider it a case in which our conclusions can be much more safely relied on.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed. And it is further ordered and decreed, that there be judgment for defendants, with costs in both courts.

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LEWIS vs. CLARK.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

It is the sum claimed, and not that recovered, which confers jurisdiction.

Whether a contract for the purchase of tobacco, not inspected, can be enforced? Quere.

The plaintiff alleged he purchased from the defendant a quantity of tobacco, which the latter refused to deliver; and the present suit was brought to recover the property, or its value, which was alleged to be \$800, and damages.

The court *a quo* gave judgment for the property, and in case it was not or could not be delivered, he assessed the plaintiff's damages at \$192 76. The defendant appealed.

*Farrar* and *M' Caleb*, for appellees, contended that the judgment could not be appealed from, the same being for \$192 67.

*Porter, J.* delivered the opinion of the court.

This action is brought to recover from the defendant sixteen hogsheads of tobacco, which the plaintiff purchased from him, or damages for their nondelivery. The judge below gave judgment for the property, and in case it was not or could not be delivered, he assessed the plaintiff's damages at \$192 76. The defendant appealed.

It has been objected in this court, that the amount for which judgment was rendered, does not enable us to take cognizance of the case: but it has been repeatedly decided that it is the sum claimed, and not that recovered, which confers jurisdiction. The amount demanded in the petition is far above \$300.

The contract and its violation are fully proved, and the amount for which judgment is given appears supported by the evidence. The only difficulty we have had in confirming the decree of the inferior court, has arisen from an inquiry, suggested by the testimony; namely, whether the tobacco was inspected or not. If the negative had been established, a very serious question would have arisen, whether such a contract could have formed the basis of an action in our courts. But, on reflection, we are of opinion that the proof is not sufficiently strong to enable us to decide the case on that ground. See 1 *Moreau's Digest*, 585. 1 *Binney*, 110. *Carthew*, 252. 4 *Burrows*, 2069.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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It is the sum claimed and not that recovered, which confers jurisdiction.

Whether a contract for the purchase of tobacco, not inspected, can be enforced? Query.

***PHELPS AND BABCOCK vs. C. AND A. HARLING.***

***REYNOLDS ET AL. INTERVENING.***

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

A consignee has a privilege for advances made upon goods consigned to him.

The plaintiffs attached certain merchandise as the property of the defendants, in the hands of Reynolds, Byrne & Co. who intervened and set up a lien on the goods seized, as factors of the defendants. It appeared that the goods were purchased by the defendants, on the faith of a letter of credit given to them by the intervening parties, and it was admitted that the latter had paid for the goods. They were consigned by the defendants to Reynolds, Byrne & Co., to be forwarded to the state of Mississippi. The court below

Eastern District, June 1831. gave judgment against the intervening parties, from which they appealed.

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vs.

C. & A. HARING  
Reynolds et al int

Pierce, for appellant, relied on the 3214th article of the Civil Code.

*M' Caley* contra.

*Mathews, J.* delivered the opinion of the court.

This suit was commenced by attachment, and property or merchandise levied on in the possession of Reynolds, Byrne & Co. as belonging to the defendants in the attachment. Afterwards the garnishees intervened, and claimed a lien or privilege on the goods seized, under the article 3124 of the Louisiana Code. The court below decided against their pretensions, and they appealed.

In the statement of facts made by the parties to this suit, it is agreed, amongst other things, that the goods attached in the possession of the appellants were purchased by the defendants in attachment, on the faith of letters of credit given by the garnishees, and were consigned to the latter by the purchasers, and that the price of them was paid by the consignees.

It appears to us that the admission of these facts, brings the appellants clearly within the provisions of the article of the Code by them relied on. The lien or privilege is granted by the first clause in the article. It commences in *hec verba*:—"Every consignor or commission agent, who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of these advances, &c." The facts admitted that the goods in dispute were paid for by Reynolds, Byrne & Co., consigned to them by the purchaser, and in their possession at the time of levying the attachment: it is inconceivable how they can be deprived of the lien and privilege accorded to consignees who have made advances on property consigned. There can certainly be no advance which

A consignee has a privilege for advances made upon goods consigned to him.



ought to be more privileged than that which is made in payment of the price of goods. It is not only on them, but for them; and without which they would probably never have become the property of the consignor, and ought, on every principle of justice and equity, to be held as a pledge to reimburse the persons who have advanced the price.

From the evidence it appears that to the value of \$350 of the attached property the interveners had not made any advance; on this, therefore, they have no lien.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be avoided, reversed and annulled. And it is further ordered, adjudged, and decreed, that judgment be here entered in favor of the appellants, with costs in both courts, except as to the sum of three hundred and fifty dollars.

#### LIVINGSTON vs. CORION

##### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where a principal constitutes another person his attorney in fact to sell a specific piece of property within a limited time, if a sale is made subsequently, without a prolongation of the time by the consent of the owner, it is null and void.

But if the principal writes to his attorney in fact just before the period of limitation expires, and states it to be his intention and will that the sale be made at a period later than that specified in the original authority, a sale made subsequently to the time first specified will be valid, and cannot be rescinded for want of authority in the agent to sell.

In a suit for the rescission of a sale of property for want of authority in the agent to sell, and of *lesion* in the price, if no decision is made by the District Court on the allegation of *lesion*, it will not be noticed in the Supreme Court.

On the 16th July, 1825, the plaintiff conveyed to Antoine Abat a tract of land, situated in the parish of Plaquemine, containing about forty-two arpents front, with forty in depth, with condition that he should sell the same before the first

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day of February, then next ensuing, by public or private sale, for the best price he could get, and apply the proceeds, first, to the payment of the costs of the deed of sale and commissions; secondly, to pay the sum of six thousand seven hundred and seventy dollars and fifty-eight cents, due to four creditors, whose debts were secured by mortgage on the land; thirdly, the residue, if any, to be ratably divided between his other creditors, not privileged, whose names were mentioned, and the amount due to each.

On the 18th December, 1825, the plaintiff wrote to his agent Bechtel, and says, among other things,—“Tell him (*Abat*) I will send him instructions about the sale of the wood lot (the land in question) in two or three days, at farthest. I think, if you would take the trouble to speak to the persons interested, individually, they would see it for their interest to have the sale postponed for a few months; you may be preparing this, by speaking to each of them you know, or rather telling *Abat* to speak to them, and in a few days he shall receive my consent in writing, which will be necessary for his justification.”—This was communicated to *Abat* by Bechtel.

Accordingly, on the 17th January following, he wrote as follows:

“J’espère que les personnes intéressées auront consenti au renvoi de la vente de l’habitation en bas; dans le cas contraire il faut se soumettre à la perte. Je ne sais de quelle manière je peux vous compenser de tout le tracas que mes affaires doivent vous occasioner.”

*Abat* not finding a purchaser before the expiration of the time limited in the deed, did, upon the authority of these letters, convey the said land to the defendant, on the 3d of April, 1826, for the sum of seven thousand dollars, payable in five annual instalments.

This suit was brought to set aside the sale, on two grounds: first, that *Abat* had no authority to sell, after the time limit-

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ed by the deed from the plaintiff to him, had expired; and secondly, that the sale ought to be set aside on the ground of lesion.

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There was judgment for the defendant in the court below, and the plaintiff appealed.

*Lockett* for appellant.

*Dennis* for appellee.

*Mathews, J.* delivered the opinion of the court.

This suit is brought to rescind the sale of a certain tract of land, situated in the parish of Plaquemines. Two grounds for rescision are alleged in the petition: 1st, want of power in A. Abat, who made the sale as agent for the plaintiff; 2d, lesion in the price. The judgment of the court below is in favour of the defendants, from which the plaintiff appealed.

The decision of the cause, in its present situation before this court, depends entirely on the interpretation which ought to be given to the power or authority under which the agent assumed to act in the sale (of the property) now claimed to be rescinded.

The evidence adduced on the trial in the District Court, shews that the plaintiff was, on the 16th of July, 1825, the owner of the land in dispute; that on that day, he conveyed it to A. Abat, to be sold by the latter for the best price which could be obtained prior to the 1st of February following, (1st February, 1826) to be appropriated to the payment of certain debts of the plaintiff, as designated on a schedule annexed to the act of transfer made to his agent, or trustee, who was authorized to sell, either in private form, or cause sale to be made at auction. The latter mode was adopted, and the property advertised on the 23d of January, 1826, to be sold on the 10th day of February following; but no sale could be effected, for want of bidders. It was finally sold on the 3d of April, 1826, and a conveyance made on the 6th of the same month, to Madame Corion by Abat, in pursuance of the public sale.

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If the pretensions of the parties rested wholly on these facts, it seems clear that the trustee, or attorney-in-fact, exceeded his authority, and the sale should be annulled as to the plaintiff. But it is contended, on the part of the defendant, that, subsequent to the deed of conveyance to Abat, by which he was limited to the 1st of February, 1826, to make sale of the land, for the account and benefit of Livingston and his creditors. The owner of the property extended the authority given to his agent indefinitely as to time;—and in support of this fact, two letters of the plaintiff are introduced; one to J. D. Bechtel, who appears, from the tenor of the communications made to him, to have been a kind of general agent for the writer; and another, directed to the attorney or trustee who had been authorized to sell the property now in dispute, as above stated. As these letters must form the basis of our judgment, the correctness of which depends solely on a just interpretation of their meaning, it is deemed proper here to transcribe those parts of them which relate to the present contest.

In the letter to Bechtel, which bears date at Washington, on the 18th of December, 1825, and was communicated to Abat on the 21st of January, 1826, the writer states to his correspondent that he was then particularly busy, or he would have written to Abat, and requests the former to tell the latter that he would send him instructions about the sale of the wood lot, which is the land in question, in two or three days at farthest, and then proceeds to say,—“I think if he (Abat) would take the trouble to speak to the persons interested, individually, they would see it for their interest to have the sale postponed for a few months. You, may-be, will hurry this by speaking to such of them as you know, or rather let Mr. Abat speak to them; and in a few days he will receive my consent in writing, to postpone the sale, which will be necessary for his justification.”

The letter to Abat direct, bears date at Washington of

the 17th of January, 1826. It contains instructions relative to other business, which seems to have been committed to his agency by the writer, and only incidentally touches the subject of the land which was about to be sold under the authority vested in Abat by the deed of July, 1825; which was done in the following words:

*"J'espère que les personnes intéressées auront consenti au renvoi de la vente de l'habitation en bas; dans le cas contraire il faut se soumettre à la perte."*

In order to give a just and proper effect to the contents of these two letters, they must be considered in relation to the original power granted to the agent and trustee by the deed of July, 1825. Under that act we shall view him simply as an attorney-in-fact, appointed to sell a specific piece of property, which he was bound to effect within a limited time, which, if not prolonged by the consent of the owner, any acts done under it, would be void. The only question, then, for solution is, whether these letters, taken either separately or conjointly, show a consent on the part of the owner, that the property might be sold, at the discretion of his agent, at any time subsequent to that pointed out in the original power. The letter addressed to Bechtel, and by him communicated to Abat, may well be looked on as the written expressions of Livingston's will, wishes, and desires in relation to the sale about to be made, directly communicated to his attorney, to whom had been intrusted the negotiation of this particular business. His will that the agent should have power to sell the property at a period later than that prescribed in the original authority, is clearly expressed in this letter. It contains the very consent which he alleged to Bechtel would be necessary to justify Abat in a postponement of the sale. The context of the writing does not imply that the consent of the writer was conditional on the agreement of his creditors. On his part it was absolute and unconditional. The clause of the letter addressed di-

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Where a principal constitutes another person his attorney-in-fact to sell a specific piece of property within a limited time, if a sale is made subsequently, without a prolongation of the time by the consent of the owner it is null and void.

But if the principal writes to his attorney in fact just before the period of limitation expires, and states it to be his intention and will that the sale be made at a period later than that specified in the original authority, a sale made subsequently to the time first specified will be valid, and cannot be rescinded for want of authority in the agent to sell.

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In a suit for the rescission of a sale of property for want of authority in the agent to sell and of lesion in the price, if no decision be made by the district court on the allegation of lesion, it will not be noticed in the supreme court

rectly to Abat which relates to the transaction giving rise to the present suit, does not in any manner militate against the consent given in that to Bechtel; it is rather in confirmation of the former expression of will. In pursuance of the best consideration we have been able to give the case, our conclusion, based on what we consider a just, legal, and equitable interpretation of these letters, corresponds with that of the judge *a quo*.

No decision having been made in the court below, in relation to the allegation of lesion, this court is not bound to notice it.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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GOODLOE vs. N. AND B. HART.

APPEAL FROM THE COURT OF THE PARISH AND CITY  
OF NEW ORLEANS.

The purchaser of slaves who has given his note in payment cannot prove a condition different from that expressed in the deed of conveyance.

Nor can he prove by parol that a condition was added by consent of parties after the conveyance was executed.

The privilege conferred by the 2498th article of the Louisiana Code is an exception to the general rule, and cannot be extended beyond the case provided for.

The defendants, N. & B. Hart, sued on a promissory note by the plaintiff, the payee, alleged it formed part of the consideration in a purchase of slaves, which the plaintiff guarantied should not abscond or prove sickly.

The notarial act showing no such condition as that contended for. The defendants offered H. M. Shiff to shew that such was the condition. To his admission the plaintiff objected, which being sustained, the defendant excepted. Judgment against the defendants, and they appealed.

*Lockett*, for appellant.

The judge below erred in refusing to admit the evidence offered by defendants as stated in their bill of exceptions, in support of their defence.

*Preston*, for appellee, relied on art L. C. 2856.

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*Porter, J.*, delivered the opinion of the court.

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The action is brought on a promissory note executed by the defendants, in favour of the plaintiff, for \$ 500, payable twelve months after date.

The defendants plead that they purchased from the plaintiff twelve slaves, for which they gave their note for \$ 5500, endorsed by one *Shiff*, together with the obligation now sued on, and that the latter was given on the express condition that the slaves should not run away for twelve months. They aver that two of the slaves did run away; that one of them was caught and returned to the defendants, and that the other has not since been heard of.

They further plead that a portion of the slaves were afflicted with redhibitory defects.

The cause was submitted to a jury, in the court below, who found for the plaintiff. The defendants appealed.

The defendants produced in evidence the bill of sale of the slaves, by which it appeared that there was no warranty such as that spoken of in the answer, in relation to the note sued on. But this bill of sale shows that the consideration for the purchase was the sum of \$ 5375 in cash, not \$ 6000 in notes, as stated in the answer.

The defendants then offered a deposition of a witness to prove that the note now sued on, was given on the condition that it should be void and of no effect, in case any of the slaves, mentioned in the bill of sale, should run away, abscond or prove sickly. The plaintiff objected to this testimony, on the ground that it was contrary to the written contract, and the court sustaining the objection, the defendants excepted.

They contend that this note was distinct and separate from the contract of sale. That the obligation of warranty therein expressed, is limited to the price mentioned in the deed, and does not apply to this agreement, which, though

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flowing from the purchase of the slaves, did not make a part of it.

Supposing this position to be tenable, of which doubt may well exist, we think the defendants are precluded from the benefit of it, by the averment in their answer, that this note, together with one endorsed by Shiff, for \$5500, formed the consideration on which the plaintiff sold them the slaves. The difference between the sum mentioned in the answer, and that expressed in the conveyance, is easily accounted for, by reducing the notes which were not due for some time, to their amount in cash value—a circumstance of very common occurrence.

The question then presents itself whether the purchaser of slaves, who has given his note in payment, can prove a condition different from that expressed in the deed of conveyance. We think he cannot. It has been contended that this agreement was made after the purchase was concluded, but admitting to be so, the effect of it is to add to the obligations of the vender. If the note made a part of the consideration of the slaves, and they were sold with the ordinary warranty, the attempt is to add something to the original contract, or to change it.

Now this cannot be done. The code says all transfers of slaves shall be in writing, and parol evidence shall not be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since.—*La. Code*, 2255, 2256.

This prohibition extends as well to agreements in relation to the purchase money, or the payment, by which the obligations of the vender are increased, as to any other else. The written contract made him responsible for redemptory defects, the parol agreement subsequently entered into, was to make him accountable for something more.

It was urged that a want of consideration could only be proved by parol. This, in many, perhaps the greater num-



ber of instances, is true ; but the rule is obviously subject to another; that you cannot prove a greater or different consideration than that you have expressed in writing.

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Lastly, it was urged that by the 2498th article of the Louisiana Code, the seller could give testimonial evidence of the latent defects which he had declared at the time of sale, and that the same privilege of introducing parol proof should be given, in this instance, to the defendants. To this position, the answer given at the bar is satisfactory and conclusive. It is an exception to the general rule, and cannot be extended beyond the case provided for.

Nor can he prove by parol that a condition was added by consent of parties after the conveyance was executed.

The privilege conferred by the 2498th article of the Louisiana Code is an exception to the general rule, and cannot be extended beyond the case provided for.

On the merits, we do not perceive that the jury and court below have erred; and it is, therefore, ordered and decreed, that the judgment appealed from be affirmed with costs.

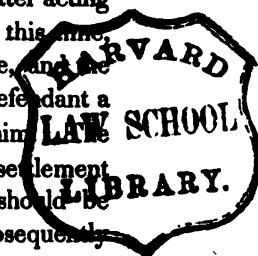
#### **BAUDUC'S SYNDICS vs. LAURENT.**

#### **APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

Until the accounts of the partnership are settled, one partner has no action against the other, and of course prescription does not run.

In complicated transactions of several years standing, it is difficult to ascertain on what grounds the jury found their verdict, and in such cases it will not be disturbed.

The insolvent and the defendant were partners in the construction and navigation of steam-boats; the latter acting for several years as master and clerk. During this time, mutual advances and disbursements were made, and the present action was brought to recover from the defendant a balance which the plaintiff alleged to be due him. The defendant pleaded the general issue; prayed for a settlement of accounts, and judgment for such balance as should be found to result in his favour. The plaintiff, subsequently put in a plea of prescription to the defendant's claim, for wages as master and clerk. The cause was tried by a jury,



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who found a verdict for the defendant, and, from the judgment thereupon, the plaintiffs appealed.

*Seghers*, for appellants. *Duncan*, for appellees.

*Martin, J.*, delivered the opinion of the court.

The petition shows the insolvent and defendant were joint owners of the steam-boat Florida, which was built and navigated by the defendant, who acted as clerk and master of her till some time in 1829, when she was sold at public auction for \$11,000, which were deposited in the Bank of Louisiana: that the insolvent had furnished the defendant with all the money necessary for the building of the boat, and the defendant received all the freights and passage money carried during one hundred and six voyages, performed by the boat, while she was their joint property; and the insolvent received several sums of money, for account of the defendant, and made advances and disbursements according to accounts annexed to the petition, whereby a balance is due him by the defendant of \$97,654, 90, subject to a deduction of such sums as the defendant may prove he spent in building or navigating the boat. Judgment is prayed for accordingly, and for one half of the money deposited as aforesaid.

The defendant pleaded the general issue; but admitted he built and navigated the boat for the joint account of himself and the insolvent; that she was sold and the proceeds deposited, as stated in the petition. That, in 1824, they both entered into a partnership, for continuing the navigation of a steam-boat, and purchased the steam-boat Packet, which was navigated till the spring of 1826, when she was sold, and the defendant went on his own and the insolvent's account to Pittsburg, where he built the steam-boat Florida, which he brought to New-Orleans, and afterwards navigated, for their joint account, on the Mississippi, till the year 1829, when she was sold as stated in the petition.

The answer concluded by an allegation that there was a

balance of about \$26,000 due by the insolvent to the defendant. A settlement of accounts for both boats was prayed and judgment accordingly.

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The case was submitted to a jury who found a verdict for the defendant.

By the judgment the defendant was ordered to be placed on the tableau of distribution, for a balance of \$662 75, as a chirographary creditor, and as a privileged one for the costs, and that one half of the money deposited in bank be paid to him.

From this judgment, the syndics appealed, after an unsuccessful attempt to obtain a new trial.

Two principal points have been presented to us.

1. A plea of prescription to the whole claim of the defendant, for his wages, as clerk and master of the boat.

2. That the jury erred in allowing credit to the defendant for a large amount of debts due to the boat, and alleged to be uncollected, without any evidence of their existence or of any diligence of the defendant in attempting to collect them.

On the first point, there cannot be any doubt that the plea was not admissible. In *Drumgoole vs. Gardner et al.*, 10, *Martin*, 135, we held that a partner has no action against another (except to make him account) until a final settlement takes place, and then for the balance that appears due. In *Ward vs. Brandt et al.*, 11, *Martin*, 333, we said a partner has no claim against the other, till all claims against the partnership be discharged; and, in *Faurie et al. vs. Milaudon*, 3, *Martin*, N. S. 178, we recognised the principle that a partner is not accountable for any transaction, nor any number of transactions, but for the balance only, which after a general settlement of accounts, may appear due.

Until the accounts of the partnership are settled one partner has no action against the other and of course prescription does not run.

It is clear, therefore, as it is admitted, the parties were partners, and the accounts of the partnership were never settled; the defendant could never have claimed the half of

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In complicated transactions of several years standing it is difficult to ascertain on what grounds the jury found their verdict, and in such cases it will not be disturbed.

his wages, which the insolvent now bound for : *Contra non valentem agere non curret prescriptio.*

On the second point, the counsel of the syndics has relied on the new code, 2833. *Curia Peilipica*, 1, 3, N. 18, p. 274, *Partida* 5, 10, 7, *id.* 14, 22. and *Lopez's Commentary on the last law, Pothier mandat*, 47. This part of the case has appeared to us to turn less on a question of law than on that of fact. It was pressed on the district judge on the motion for a new trial. Upon complicated transactions of several years standing, it is difficult to ascertain the grounds taken by a jury in the process on which they formed their verdict. The parties had the benefit of an able and respectable jury of merchants, and the judge before whom the case was tried has expressed his satisfaction of their decision, and we see no reason to disturb it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

#### PAULDING vs. DOWELL.

##### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

In an action for rent the plaintiff will recover without adducing title, if he show a continued possession.

Where a person enters upon vacant premises, if on being sued for the rent by the owner (who was unknown to him when he entered) he reconvenes for repairs, he will be considered not in the light of an usurper, but as possessing for the owner.

The plaintiff claimed from the defendant a certain sum for the rent of a house and lot. The latter pleaded, first, that he was not indebted in any sum whatever ; second, that the plaintiff was not the owner of the premises at the institution of the suit ; and thirdly, compensation for repairs. The plaintiff produced no title to the premises, except a former occupancy by himself, which was continued by others in his right for some years. The evidence showed that it was afterwards deserted, and remained for a long time un-

tenanted and in a state of waste. In this condition, the defendant took possession, and put upon it repairs to the amount of \$ 125.

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The court *a quo* was of opinion, and so decreed, that the plaintiff had suffered his title by possession to be lost, and could not recover without showing some other. From this judgment the plaintiff appealed.

*Hennen*, for appellant. *Morse*, for appellee.

*Martin, J.*, delivered the opinion of the court.

To a claim for house rent, the defendant pleaded he owed nothing: that, at the institution of the suit, the plaintiff was not owner of the premises: that, when the defendant went in, the house was not in tenantable order, having been deserted for a number of years, and he took peaceable and quiet possession of it and repaired it. The amount spent in repairs was pleaded in reconvention against the plaintiff or whoever might own the house. There was judgment against the plaintiff, who appealed.

The testimony shews he was in possession of the premises in 1819, and rented them to Walton, who occupied them as his tenant for about five years; that, in 1826, the defendant entered into the premises and occupied them for a year, during which he made repairs to the value of \$ 125. On his leaving them, the plaintiff rented them to Foster. Before the defendant went in, the premises were for a long time unoccupied, and were the resorts of runaway slaves, and the house was not in tenantable order.

It has been urged, and the judge *a quo* has concluded that the plaintiff, having shown no title, and it being proved he had lost his possession, he could not recover.—*Civil Code*, 3410, 3412.

It has appeared to us the plaintiff, having shown a possession since the year 1819, ought to recover on that possession, unless he be shown to have lost it. This he would

In an action for rent the plaintiff will recover without adducing title if he show a continued possession.

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Where a person enters upon vacant premises, if on being sued for the rent by the owner, who was unknown to him when he entered, he reconvenes for repairs he will be considered not in the light of an usurper but as possessing for the owner.

certainly have done, had the defendant gone in as a *usurper*.

It is in evidence he occupied the premises for a year, and begun by putting repairs on the premises, for the account of the owner, who was then unknown to him, as he alleges. The amount of these repairs, he claims in reconvention.

His leaving the premises is evidence that he pretends no title thereto—his claim for repairs is also evidence of his. *Bād* faith is not to be presumed, and the claim he makes is grounded on his having in possessed good faith, but under a precarious title, as a tenant by sufferance. If so he occupied for the owner; and when a lawful occupancy results from the pleadings, and the evidence, every idea of an unlawful one, or of usurpation is repelled.

We conclude the District Court erred in rejecting the claim.

According to the testimony of the plaintiff's witnesses, we would be disposed to allow \$30 *per* month, for the rent. One of the witnesses for the defendant, thinks that rent was a fair one, after the repairs were made; another thinks it was never worth more than \$25. It is in evidence the upper story alone is now rented at \$20 a month. Several witnesses say no rent could have been obtained for it when the defendant went in, till it was repaired.

On this, we have thought \$25 *per* month was the value of the rent, after the repairs were made. We have deducted two months for the time we suppose taken in repairing the house; the evidence does not show an occupancy of more than one year, though a longer one is alleged in the petition, and was the basis of the judgment appealed from. This establishes a claim for rent for 250 dollars, from which we have deducted the value of the repairs, \$125.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that there be judgment in favour of the plaintiff for one hundred and twenty-five dollars, with costs in both courts.

**HERMAN AND CO. vs. PFISTER—MERLE INTERVENING.** Eastern District,  
June 1881.

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

If a petition in intervention be answered on the merits and the cause tried in relation to them, the right of the party to intervene cannot be questioned on appeal.

Holders of negotiable instruments are not required to prove the consideration they gave for them unless specially called on to do so, by that consideration being denied in the answer.

The defendant purchased a lot of ground for the price of \$6000, for which he executed four notes, secured by mortgage on the property. Two of those notes, amounting to \$2000, were transferred to the plaintiffs, who obtained an order of seizure, under which the property was sold for \$4005. The sheriff made return that the purchaser had refused to pay the price, because the incumbrance on the property amounted to \$6000, which incumbrance he was unable to remove; and that he was forbidden by law to receive any portion of the price, except that over and above the price. Pending a rule taken on the sheriff to shew cause why he should not pay over to the plaintiffs the amount of their debt out of the proceeds of the property sold, Merle intervened, and claimed two-thirds of the proceeds of the mortgaged property, as holder of the other two notes, amounting to \$4000, given by the defendant to secure the price.

The court *a quo* was of opinion that the plaintiffs and the intervening party were creditors *in solido*, and decreed that the proceeds of the property sold be distributed between them in proportion to their respective debts. From this judgment the plaintiffs appealed.

*Dennis* for appellant.

*Eustis* for intervening party.

*Porter, J.* delivered the opinion of the court.

The defendant purchased from one Dupeux a lot of ground for \$6000, and gave, to secure the payment, four notes; two in favour of the intervener, for the first and last instalments, of \$2000 each; and two in favour of Gottchalk & Rhimer,

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*Merle intervening*

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*Merle intervening*

for the second instalment, one being for \$1500, and the other for \$500.

These notes were endorsed by the respective payees. The plaintiffs are holders of those given for the second instalment, which were payable to Gottschalk & Reimer. They were transferred to the plaintiffs, in the usual course of trade, and the transferor, Dupeux, afterwards made an authentic act, by which he acknowledged the transaction, and set over to the transferees all his title in the notes, together with all right of mortgage which belonged to the debt for which these notes were given.

In virtue of this assignment the plaintiffs commenced an hypothecary action, and proceeded to sell the lot of ground which formed the consideration of obligations in their possession. After the sale, by which the sum of \$4005 came into the sheriff's hands, that officer refused to pay over to the plaintiffs the sum due to them, alleging that there was an incumbrance on the property, to the amount of \$6000, which he was unable to remove, and that he was forbidden by law to raise any portion of the price except that, over and above the mortgages.

Upon which, Merle, who was the payee and endorser of the notes given for the first and last instalment intervened, and by a petition asserted that he was holder of these notes, and had a right to two-thirds of the proceeds of the sale of the mortgaged property, then in the sheriff's hands.

If a petition in intervention be answered on the merits and the cause tried in relation to them, the right of the party to intervene cannot be questioned on appeal.

The plaintiffs answered this demand by a general denial, and the parties went to trial on the issue thus joined. The court below sustained the claim of the interveners, and the plaintiffs appealed.

It has been objected that the appellee's rights can be inquired into, as he should have made opposition in the character of a *third person*, and not as intervener.

We think this objection cannot be made here, as the plaintiffs answered the petition of intervention on the merits, and went to trial in relation to them, in the court below.



It has been also urged, that the appellee has not proved the consideration he gave for the notes in his possession. They were made payable to him in the first instance, to facilitate their negotiation. They were negotiated, as appears by endorsements made on them, and the endorser being now the holder, they must be presumed to be in his hands rightfully, and because he was compelled to take them up. Holders of negotiable instruments are not required to prove the consideration they gave for them, unless specially called on to do so by that consideration being denied in the answer. This case does not come within the rule established in relation to instruments which the holder has once negotiated, and has taken up. The endorser in the present instance never transferred them; he put his name on them, for the accommodation of the maker.

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*Merle intervening*

Holders of negotiable instruments are not required to prove the consideration they gave for them unless specially called on to do so, by that consideration being denied in the answer.

As to the objection made on the ground that the party who pays part of a debt for which he is bound for another, cannot be subrogated to the injury of the creditors' rights for the balance remaining due, we do not see how it applies to this case. The original creditor is not before the court; both plaintiffs and intervener claim through him, and every objection of this kind applies as forcibly to the one as to the other.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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**GRAVIER ET AL. vs. GRAVIER.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

The prescription of thirty years does not necessarily extinguish all debts.

Bertrand Gravier became insolvent in France in 1783, and entered into a concordat with his creditors, by which, on certain conditions, he obtained an indefinite respite for the payment of their claims. He died in New-Orleans in 1787, and his effects were adjudicated to the appellant, John

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Gravier, coheir with the appellees of Bertrand Gravier, on condition that he should pay the debts of the estate.

In 1824 the appellees sued for a partition, and obtained judgment against John Gravier for \$22,083 75, provided the plaintiffs gave bond in the sum of \$15,069, to indemnify the defendant in case he should be compelled to pay any of the creditors of Bertrand Gravier, under the conditions of the adjudication.

On the 27th November, 1830, a rule was taken by the plaintiff to shew cause why the bond given in conformity to to the above decree should not be cancelled, inasmuch as all claims against the estate of Bertrand Gravier were barred by prescription. The court ordered the rule to be made absolute, and the defendant appealed.

*Dennis* for appellee.

*Young* for appellant.

*Porter J.* delivered the opinion of the court.

The plaintiffs gave to the defendant a bond of indemnity, to save him harmless from the claims of the creditors of Bertrand Gravier's estate. Thirty years having elapsed since the opening of the succession, the obligors applied to the court of the first instance to have the bond cancelled, averring that all claims had become extinguished by prescription. The court sustained this application, and the defendant appealed.

The prescription of thirty years does not necessarily extinguish all debts.

We think the court erred. The prescription of thirty years does not necessarily extinguish all debts. There may be among the creditors some, against whom prescription did not run for a portion of the time just stated. When the obligor of an instrument such as this asks to have it cancelled, it is not sufficient he should render it probable no injury will occur; he ought to place the matter beyond doubt before the obligee can be deprived of his security. If the debts are all discharged, little injury is sustained by the plaintiffs in suffering the instrument to remain;—if, on the contrary, any yet

exist, a great hardship would be inflicted by depriving the defendant of the protection against them which the bond affords.

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CRAVIER ET AL  
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GRAYIER.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be reversed. And it is further ordered, that the rule taken in this case be discharged, the appellee paying costs in both courts.

*CANIZO'S SYNDICS vs. CUADRA.*

APPEAL FROM THE COURT OF THE PARISH AND CITY  
OF NEW ORLEANS.

The pawnee who has not taken written evidence by an authentic or private instrument of the pawning, cannot avail himself of it against third persons.

This suit was brought to recover from the defendant certain articles of plate and jewellery which had been deposited with him by the insolvent previous to his failure, and which formed part of the property surrendered to his creditors.

The defendant admitted the receipt of the articles, but alleged they were pawned to him by the insolvent as security for a debt. It appeared from the evidence that the articles were not pawned, but delivered to the defendant for safe-keeping. There was a verdict, and judgment for the plaintiffs, and the defendant appealed.

*Vinat* for appellant.

*Cannon* for appellee.

*Martin, J.* delivered the opinion of the court.

The plaintiff, syndic of his own creditors, claims part of the property surrendered, now in the defendant's possession. The claim is resisted on the ground that they were, previous to the failure, received by the defendant, in pawn; and his being a creditor being proved, is a circumstance which, with his possession, affords a strong presumption that the

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*GANIZO'S SYN'S.*  
vs.  
*GUADRA.*

The pawnee who has not taken written evidence by an authentic or private instrument of the pawning, cannot avail himself of it against third persons

goods were given him as a security for his debt. The plea was disallowed, and the defendant appealed.

Under the Civil Code, 3125, the pawnee who has not taken written evidence (by an authentic or private instrument) of the pawning, cannot avail himself of it against third persons. This, in the present case, is not pretended to have been done.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be affirmed with costs.

#### JOSEPH vs. MORENO.

##### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A written promise to sell or convey real property is valid notwithstanding there be no signing or written assent by the promisee. Proof of that assent may be proved by evidence *aliunde*.

The plaintiff, Jean Joseph, instituted this suit to compel the defendant Moreno to the performance of a promise given the plaintiff, to convey to him one-half of a tract of land, situate in the parish of Plaquemines, of three-and-a-half arpents front, and also to be declared part owner of a slave in possession of defendant.

The plaintiff adduced a written promise from Moreno to convey him one-and-a-half arpents of the above-mentioned tract. In regard to the slave, the testimony shewed him to be paraphernal property. There was judgment for plaintiff in the court below for one-and-three-fourth arpents. Defendant appealed.

*Vinot* for appellant.

The written promise to sell was not regularly accepted by the plaintiff.

*Preston* for appellee.

*Mathews, J.* delivered the opinion of the court.

This suit is based on a promise made in writing by the defendant, to sell to the plaintiff one-and-a-half arpents of land.

front on the Mississippi, situated in the parish of Plaquemines. The court below decreed that a conveyance should be made by the former to the latter, of an undivided half of three-and-a-half arpents, (which had been bought by the defendant at a sale of the estate of one Gautier,) on condition that one-half the price of the whole tract should be refunded to him by the plaintiff. From this decree the defendant appealed.

The judgment of the District Court seems to be founded principally on the promise made in writing to sell. The correctness of this decision is strenuously opposed by the counsel of the appellant, on the ground that the promise was not accepted by the person in whose favour it was; and in support of the doctrine which he undertakes to maintain, reference is made to the Louisiana Code, articles 2415 and 2437, and sequent; and to 3d Merlin Reports, on the subject of written contracts. These articles of the Louisiana Code are similar to the articles 2 and 9 of the old Civil Code, found in pp. 344 and 346 of that book. They received an interpretation in the case of Crocker vs. Neily et al, reported in 3d N. S. p. 583. The facts in that case are almost identical with those of the present. There was a promise to sell and convey certain real property not accepted by the vendee; that is, the writing by which the promise was made, was not signed by the party who claimed its benefits; but proof of its acceptance, or consent of the promisee, was made out by facts *aliunde*. The same thing has been done in the present instance. There is also a case in 6th N. S. which supports the doctrine established in that first cited. See page 432 and sequent. *Stare decisis* is a good legal maxim; but we are of opinion that the court below has decreed more land to the plaintiff than the evidence of the case authorized. The promise to sell, which is certainly the main legal basis of his claim, is limited to one-and-a-half arpents front; and we find adjudged to him one and three-fourths. Now, in a tract of land containing only one-and-a-half, or one-and-three-fourth arpents, which gives a difference of one-

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A written promise to sell or convey real property is valid notwithstanding there be no signing or written assent by the promisee. Proof of that assent may be proved by evidence *aliunde*.

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seventh, this difference cannot be viewed as a *minimum* unrespected by law, as contended for by the appellee's counsel.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be avoided, reversed, and annulled. And proceeding to give such judgment as ought, in our opinion, to have been given in the court below, it is further ordered, adjudged, and decreed, that the defendant do convey to the plaintiff one-and-a-half arpents front on the Mississippi, of the tract of land described in the petition, (with such depth as may appertain to it) within ten days after notice of this judgment or decree, and so soon as the plaintiff shall pay to him, or deposite for his use with the parish judge of Plaquemines, the sum of two hundred and thirty-seven dollars and eighty-six cents, (\$237 86,) being the price as stipulated;—the plaintiff and appellee to pay the costs of this appeal, and the defendant and appellant, those of the District Court.

#### PENNE vs. TOURNE

##### APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The affidavit necessary for the continuance of a cause may be made by the person who represents the absent party; but where any thing occurs which excites suspicion that the party has absented himself to obtain a greater latitude through the oath of an agent or his attorney than he could have had were he present, the continuance may be properly refused.

The oath of the attorney to facts, the knowledge of which he derives from his client, is sufficient for a continuance.

When this cause was called for trial, a continuance was prayed for on the affidavit of defendant's counsel, setting forth that a material witness, by whom he expected to prove certain facts, was absent; and that his knowledge of what this witness was expected to prove, was derived from his client, who was absent from the state.

The court *a quo* refused to continue. The cause was tried, and the defendant appealed.

*Morphy* for appellee.

1st. In order to obtain a continuance, the materiality of an absent witness must be sworn to by the party himself, or by some one having a direct and personal knowledge of the alleged materiality.—*C. P. art. 465.*

*Cannon* for appellant.

*Porter, J.* delivered the opinion of the court.

On the trial of this cause in the court below, a continuance was moved for on the part of the defendant, on an affidavit made by his attorney, of the materiality of a witness, and of due diligence to procure him.

The attorney admitted the knowledge of the materiality of the witness had been derived from his client, and the court considering there was not sufficient evidence before it of this fact, refused the continuance.

The 465th article of the Code of Practice declares, that if one of the witnesses summoned has gone away, and the party applying for continuance swear that he did not know such witness intended to depart, and that his testimony is material, a continuance may be granted.

Under this provision it has been made a point in the cause, that no other person but the party in the suit can make the affidavit. This construction we think too restricted. If the expressions were to be understood thus literally by the court, a nonresident plaintiff, or a defendant where property was attached, would be denied the means of obtaining justice in our courts. This was certainly not contemplated. What a man does by another, he does by himself; and if the case be such a one as presents a fair apology for the party not being present himself in court, we think the person who represents him may make the necessary affidavits to obtain a continuance.

Whether the case is such a one as authorizes the plaintiff or defendant to be absent, and exercise the right just spoken of through an agent, must depend on the circumstances belonging to it. It is difficult to lay down any general rule. The

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The affidavit necessary for the continuance of a cause may be made by the person who represents the absent party; but where any thing occurs which excites suspicion that the party has absented himself to obtain a greater latitude through the oath of an agent or his attorney than he could have had were he present, the continuance may be properly refused.

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right to obtain continuance is frequently very much abused, and it is proper that courts should be vigilant in preventing this abuse: while, on the other hand, it is important that the fair exercise of it should not be checked; for it is of the first importance to a correct administration of justice. Where any thing occurs which excites suspicion that the party has absented himself to obtain a greater latitude through the oath of an agent, or his attorney, than he could have had were he present, the continuance may be properly refused. But where nothing occurs to countenance such an idea, the court should act on such evidence as the nature of the case is susceptible of. In this instance it is sworn that the defendant had gone on a voyage to France, and nothing suggests the idea that the absence was produced by this suit, or with a view to influence, in any manner, the conducting of the defence. We should be sorry to lay down a rule which would convey the idea that the moment a man is sued he is compelled to remain here until it is terminated; pressing causes, previously existing, may produce his absence, and matters arising after the action is brought, may require him to go away.

The oath of the attorney to facts the knowledge of which he derives from his client, is sufficient for a continuance.

Under the circumstances proved, the oath of the attorney in this instance was sufficient to authorize the court to grant the continuance. His knowledge, it is true, was derivative; but he negatives all idea of collusion by swearing the witness was material, and by taking steps to have him summoned previous to the trial. Had he asked the witness what he could prove, it would still have been derivative; a little stronger, perhaps, than the information given by the client, but not much more. Cases of this kind are in a great measure confided to the discretion of the court. The 468th article of the Code of Practice, after laying down the rules for ordinary cases, gives this power to meet those that present special circumstances. We think that discretion was not judiciously exercised in this instance.

And it is therefore ordered, adjudged, and decreed, that



the judgment of the District Court be annulled, avoided, and reversed, and the cause remanded for a new trial; the appellee paying the costs of this appeal.

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vs.  
TOURNE.

**HALPHEN vs. FRANKLIN'S CURATOR.**

**APPEAL FROM THE COURT OF THE PARISH AND CITY OF  
NEW-ORLEANS.**

In a case where no question of law is raised, the judgment of the court *a quo* will be confirmed if it appear to be in conformity with the facts of the case.

The plaintiff claimed from the defendant \$408, for medical services rendered to the deceased and his family. The court *a quo* was of opinion, from the testimony, that the claim was just, and gave judgment against the curator, from which he appealed.

*Nixon*, for appellant. *De Armas*, for appellee.

*Martin, J.* delivered the opinion of the court.

This is a suit brought on a physician's bill, for professional services to the deceased, his house-keeper, and slaves. The plaintiff had judgment and the curator appealed.

Claims like the present, against the estates of deceased persons, being sometimes swelled or improperly urged, the curator thought it his duty to resist the present both in the lower and this court.

The judge of probates has stated that, after mature consideration, the same objections might appear founded against one of the witnesses, who, from the situation in which he was placed, could have hardly acquired positive knowledge of certain facts. The court was conscious from other unquestionable parts of the testimony, that the services of the plaintiff were actually rendered and were not over-charged.

No question of law has been raised before us, and the

In a case where no question of law is raised, the judgment of the court *a quo* will be confirmed if it appear to be in conformity with the facts of the case.

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reading of the record has not impressed us with the idea that the judge erred.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs in both courts.

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PONTALBA vs. PONTALBA.

APPEAL FROM THE COURT OF THE PARISH AND CITY  
OF NEW-ORLEANS.

A curator *ad hoc* is intended by law as a protector to the interests of the absentee, and should be considered as principally beneficial to the defendant, and consequently the plaintiff in such a case is not bound to pay for services rendered by the curator.

The object of this suit, on the part of the wife, was to obtain the possession and control of her paraphernal estate, in which she succeeded, but was condemned to the payment of costs. A practising lawyer was appointed curator *ad hoc* to represent the absent defendant, residing in France, who took a rule on the plaintiff, to show cause why she should not pay him a fee of \$500, for services rendered in the suit. The court *a quo* made the rule absolute, and the plaintiff appealed.

*Moreau*, for appellant.

*Dennis*, for appellee.

*Mathews, J.* delivered the opinion of the court.

In this case the plaintiff obtained a decree in the court below, by which her right to possess and administer certain property, claimed as paraphernal, was recognized. But as the suit was considered unnecessary, and consequently vexatious, as the attorney in fact of the defendant, had offered previously to do amicably all things required to give her possession of her paraphernal property, the judge *a quo* condemned her to pay the costs, and amongst the items as constituting costs, one of 500 dollars is found allowed to *H. R. Dennis, Esq.* who was appointed curator *ad hoc* for the de-

fendant, who resides without the jurisdiction of the State. The plaintiff acquiesces in the decision of the Parish Court, in all things, except that part of the judgment which condemns her to pay this allowance to the curator appointed to defend the suit against her, and from this she appealed.

The appointment of the curator *ad hoc* (as this office is denominated by the Louisiana Code,) was provoked by the institution of the suit, as being necessary to enable the plaintiff to prosecute her claim. An officer of this kind is, nevertheless, intended by law as a protection to the interests of the absentee, and should be considered as principally beneficial to the defendant; and consequently, the plaintiff in such a case, is not bound to pay for services rendered by the curator. Any other person may be appointed as well as an attorney at law, and would have no right to claim any thing as taxed costs, when the curator, as in the present case, is also an advocate, regularly licenced to practice in the different courts of the state, he may claim the fee allowed by law, as in any other case, wherein he might succeed in throwing the costs of suit on his adversary; but as to any extra compensation to which he may be equitably entitled for services rendered, his remuneration should be allowed out of the funds of the person whom he represents. The case cited from 3d *Martin*, p. 364, we do not think applicable to the present. There the compensation was granted to the attorney of an insolvent, in consequence of an opinion then entertained by the court, that his services might fairly be considered as having operated a benefit to the whole mass of creditors. The examples cited of judgments favourable to the defensors appointed in attachment cases, we consider equally inapplicable to the subject now before the court. The remuneration allowed in such cases, is always taken from the funds of the defendants. From the best view we have been able to take of this cause, our opinion is, that the Parish Court erred in allowing to the curator *ad hoc* the sum of 500 dollars, claimed by him as costs against the plaintiff.

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PONTALBA.

A curator *ad hoc* is intended by law as a protector to the interests of the absentee, and should be considered as principally beneficial to the defendant, and consequently the plaintiff in such a case is not bound to pay for services rendered by the curator.

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vs  
PONTALBA.

It is therefore ordered, adjudged and decreed, that the judgment of the court below, be in this respect avoided, reversed and annulled, and that it be affirmed in all other matters, allowing to the attorney for the defendant, his legal fees to be taxed according to law, if any be allowable, reserving to the defendant, Pontalba, his right to appeal.

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*BEALE'S HEIRS vs DE GRUY.*

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Questions relating to redhibitory vices and defects in things sold, must be solved principally in relation to the peculiar circumstances and facts of each individual case.

Unless the object sold be absolutely useless, it is rather the duty of courts of justice to make a fair deduction from the price, than entirely to avoid the sale, especially when the real value of the thing, bears any reasonable proportion to the price agreed on.

On the 25th of November, 1830, the plaintiffs, under an order of the Court of Probates, exposed to sale at public auction two slaves (the mother and daughter), which were struck off to the defendant, as the last and highest bidder for the price of \$1160, payable in two equal instalments, for notes satisfactorily endorsed with mortgage. This suit was brought to compel the defendant to comply with the terms and conditions of the sale.

The answer averred, that one of the slaves (the mother), was, at the time of the sale, and to the knowledge of the seller, afflicted with an incurable disease; and concluded with a prayer for a rescision of the sale, damages, &c.

In support of the defence, a physician was introduced, who stated: that the slave was affected with a disease termed in French *Varices*, and that it had been of long standing. He could not say that the plaintiffs knew of its existence, or that the disease was, in its nature, incurable: but, in his opinion, the value of the slave was diminished by it one third. The court *a quo* gave judgment for a reduc-

tion of the price, and decreed that the defendant should give his notes for it (thus reduced) in pursuance of the conditions of the probate sale. The defendant appealed.

*Seghers*, for appellee, contended that the case was not a redhibitory one, and cited *C. P. art. 549—C. C. art. 2521*.

*Derbigny* and *Dennis*, for appellant.

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*Mathews, J.*, delivered the opinion of the court.

This suit was brought to compel the defendant to comply with the terms and conditions imposed by a probate sale of the succession of Thos. Beale, at which he became the purchaser of two female slaves, a mother and her daughter, at the price of 1160 dollars, for which he was bound to give his promissory notes, satisfactorily endorsed, &c. one payable on the last of April, 1831, and the other on the last of April, 1832. The defendant justifies his refusal to give said notes on account of a redhibitory defect in one of the slaves purchased; and, in his answer, claims a rescision of the contract *in toto*. The court below gave judgment for a reduction in the price, and decreed that the defendant should give his notes for it thus reduced, in pursuance of the conditions of the probate sale. From this judgment he appealed and now claims an entire rescision of the contract.

In support of his right to obtain such judgment, his counsel relies on the art. 2496 of the Louisiana Code, and a decision found in 8 *Martin's Reports*, p. 313. That decision was made under an article of the old Code, similar to that cited from the new. It appears to be difficult to reduce the doctrine of redhibition to any precise and explicit rules calculated to answer the ends of justice in every case which may arise. Questions relating to redhibitory vices and defects in things sold must be solved principally in relation to the peculiar facts and circumstances of each individual case. With regard to the bodily vices and defects of slaves, our law divides them into two classes: one denominated abso-

Questions relating to redhibitory vices and defects in things sold, must be solved principally in relation to the peculiar circumstances and facts of each individual case.

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lute and the other relative. The former, in all cases, afford a legal ground for redhibition; the latter may also furnish a good cause for an entire rescision of the contract of sale or a reduction of price, according to the facts of each particular case. In the present suit, there is no evidence which shows the disease of the slave alleged to be defective, to be of the class defined as absolute. A physician, the only witness examined, in relation to it, who was called in by the vendee, declares his opinion to be that it is not incurable, but that from its nature, so long as it endures interruptions to the services of the slave afflicted, would be a necessary consequence; that it appeared to him to have been of considerable duration; and, from this circumstance difficult of cure. He concludes the slave in question to be worth one-third less, in consequence of her diseased state, than she would be if sound. The disease appears to be an enlargement of the veins in one of her legs.

On this testimony we are obliged to determine whether or not the disease proven constitutes a redhibitory defect.

The article of the Code cited (2496) defines "redhibition to be the avoidance of sale, on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased it, had he known of the vice." The article 2497 declares that "apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices." The true meaning of this last article is not very perspicuous; that is, whether the defect should be open and apparent to the buyer by a view of the object offered for sale, in the manner in which it is exhibited to his sight; or whether he is not bound to inspect and examine it with the care and caution ordinarily used by prudent men on such occasions.

It is, however, unnecessary to give any interpretation to it in the present case, in consequence of the conclusion to

which the article 2501 necessarily leads us. There is a clause in this article, which we believe did not exist in the old Code, that seems to control, in a great degree, that part of the article 2496 relative to the inconvenience and imperfection of the use of things purchased. After the distinction of bodily defects or vices of slaves into absolute and relative, it is declared that the former are those of which the bare existence gives rise to the redhibitory action. But "relative vices are those which give rise to it only in proportion to the degree in which they disable the object sold."—From this we conclude that unless the object sold be absolutely useless, it is rather the duty of courts of justice to make a fair deduction from the price, than entirely to avoid the sale, especially when the real value of the thing bears any reasonable proportion to the price agreed on. The diminution of value in consequence of the disease of the slave, in the present instance, is estimated by the defendant's witness at one-third less than the price stipulated; and we perceive nothing in the whole testimony of the cause, which requires our interference in relation to the conclusion of the court below, on the relative value of the two slaves purchased by the defendant. But as the time is elapsed within which the first note was to have been made payable, the judgment of the District Court should be amended by decreeing to the plaintiffs the immediate payment of one-half the sum allowed, and a note be given for the balance, in pursuance of the conditions under which the probate sale took place.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be amended to read as follows, viz. "That the defendant pay to the plaintiff the sum of four hundred and seventy dollars, with interest thereon at 5 per centum per annum, since the last day of April, 1831, till paid; and that he do execute and deliver to the plaintiff his promissory note, satisfactorily endorsed, and bearing mortgage on the two slaves, for the sum of four hundred and

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Unless the object sold be absolutely useless, it is rather the duty of courts of justice to make a fair deduction from the price than entirely to avoid the sale, especially when the real value of the thing bears any reasonable proportion to the price agreed on

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And it is finally ordered, adjudged, and decreed, that the judgment of the District Court, thus amended, be affirmed: *vs.*  
 DE GRAY. and that the appellant pay costs in both courts.

*SPENCER'S SYNDICS vs. LEE, WALTON AND CO.*

APPEAL FROM THE COURT OF THE PARISH AND CITY  
 OF NEW-ORLEANS.

A party is excluded from being a witness, on the ground of interest, and when that interest ceases the objection is removed.

Though a witness may from the face of the record appear *prima facie* interested, he should not be rejected without enabling him to explain his situation, by being questioned on his *voir dire*.

The syndics of the estate of Spencer instituted suit against the defendants, to make them disgorge various moneys and property, which they obtained from the insolvent when in failing circumstances, to the fraud of other creditors.

The plaintiffs offered one Frost, to prove that the defendants had admitted, in his presence, their knowledge of the insolvency at the time the moneys and property were received. The defendants objected to Frost, as he was a creditor to the estate, and, therefore, party to the suit. The plaintiff then offered a receipt by Frost of his dividends, and a release of all further demands on the estate. Defendants excepted, and the court sustained them. There was judgment for defendants, and plaintiffs appealed.

*Maybin and Dennis* for appellant.

*Preston and Conrad*, for appellee.

*Porter, J.* delivered the opinion of the court.

This is an action to annul certain transactions between the insolvent and the defendants, on the allegation that they were in fraud of his creditors. On the trial the plaintiffs offered a witness, who was objected to as being a creditor of the estate, and interested in the event of the suit: whereupon



they presented an instrument, which the witness had executed, acknowledging the payment of certain dividends, and releasing the estate from all claims he might have on it.

The court was of opinion that "the witness, as one of the creditors, having been a party to the suit, had not legally ceased to be so, in both the nature and circumstances of the case;" and rejected his testimony.

A party to a suit is excluded from testifying, on the ground of interest, and when that interest ceases, the objection is removed. Where the witness is not nominally a plaintiff or defendant, as was the case in this instance, his competency is free from all technical difficulty, and rests solely on the ground just stated; and the moment he ceased to be a creditor, he ceased being a party to the action, and had no interest in the event of the suit. We see no reason why a witness so circumstanced should not be permitted to testify, and we think the court erred in rejecting him.

It has been argued in this court that the discharge given by the witness was fictitious, and that in truth no dividends had been made, nor moneys received by him such as the receipt speaks of. The evidence shews that regular dividends had not been declared, but the syndics may have paid money out of the regular course, to render the witness competent, and if such was the fact, it might furnish ground for receiving his testimony with caution, but did not disqualify him from testifying.

A satisfactory explanation, however, might have been given of the real situation of the witness, had the court permitted the plaintiffs to question him on his *voir dire*. They offered to do so, but were refused the permission; and in that refusal we think the judge erred. Though a witness may, from the face of the record, appear *prima facie* interested, he should not be rejected without enabling him to explain his situation.—*Starkie on Evidence*, p. 4, p. 1735. The rules of evidence in relation to the competency of witnesses,

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A party is excluded from being a witness on the ground of interest and when that interest ceases the objection is removed.

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have, as it is well known, been considerably modified of late. The greatest difficulty in the administration of justice, is, to ascertain the truth in relation to the facts at issue. The knowledge of them is most frequently confined to a few: and an easy acquiescence in objections to their competency as witnesses, not unfrequently closes all the avenues by which truth can be reached. The inconvenience, on the other side, of receiving testimony from those who may have an interest, is not so great; for after they are heard, they are not necessarily to be believed.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and it is further ordered and decreed, that this case be remanded to the said court, with directions to the judge not to refuse permission to the plaintiffs to question a witness offered by them on his *voir dire*, and not to reject as incompetent one of the original creditors, who may have ceased to have an interest in the estate of the insolvent, at the time he is offered as a witness: the appellee paying the costs of this appeal.

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MAYOR ET AL. vs. PICQUET.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A purchaser of town lots in the city of New-Orleans from the United States is exempt from taxation for five years after their alienation.

This suit was brought to recover from the defendant his proportion of tax, imposed by an ordinance of the city council on the owners of lots, for paving and improving the streets, side-walks, &c.

The defendant resisted the payment on the ground that he was a purchaser from the United States, and as such exempt from taxation for five years, which were unexpired.

There was judgment for the plaintiffs in the court below. and the defendant appealed.

*Dennis* for appellant. *Soule* for appellees.

*Porter, J.* delivered the opinion of the court.

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This case presents the question, whether town lots in the city of New-Orleans, which once belonged to the United States and have been sold by them, are exempt from state and city taxation for the period of five years after their alienation. The court of the first instance was of opinion they are not, and the defendant appealed.

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Congress imposed as a condition of the admission of Louisiana into the Union, that the convention should provide by an ordinance (irrevocable without the consent of the United States) that the people of the territory of Orleans do, for ever, disclaim all right or title to the waste and unappropriated lands lying within the territory; and that the same shall be and remain at the sole and entire disposition of the United States: and, moreover, that *each and every tract of land* sold by congress, shall be and remain exempt from any tax laid by the order or under the authority of the state, county, township, or any other purpose whatever, for the term of five years from and after the respective days of the sale thereof.—1 *Martin's Dig.* 216. The convention which formed the constitution of this state, accepted the condition, and passed an ordinance in conformity thereto.—1 *Martin's Dig.* 132.

We are of a different opinion from the judge of the first instance. In common parlance, it is true, *town lots* are not designated by the terms "*tracts of land*;" but, strictly speaking, the latter embrace the former; and we adopt the construction the more readily, because it gives effect to the intention and spirit of the compact between the United States and this state.

A purchaser of town lots in the city of New-Orleans from the U. States is exempt from taxation for five years after their alienation.

This exemption, however, only continues for five years from the date of the alienation. The ordinance in question laid a tax for a certain number of years, to reimburse the corporation for expenses incurred in improving the streets, but left it optional with the proprietors of lots to discharge themselves from the tax, on paying the capital advanced.—The defendant has chosen the latter alternative. The tax

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is for twenty years, and the capital in cash, equivalent to the amount levied for that time, is proved to \$525. Five years' exemption reduces this sum to three-fourths the amount due for the whole term.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed. And it is further ordered, adjudged, and decreed, that there be judgment against the defendant for the sum of three hundred and ninety-three dollars and seventy-five cents, with costs in the court of the first instance; those of appeal to be paid by the appellees.

**BRADBURY AND FOSTER vs. GEORGE W. MORGAN.  
OGILVIE ET AL INTERVENING.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

For the government of judicial proceedings in the United States courts within the limits of Louisiana, its laws directing the mode of practice in the courts of the state, passed prior to the 26th of May, 1824, must be looked to as the legitimate rules of practice in those of the United States, and not those rules of practice which may have been subsequently introduced by the legislative power of the state.

The act of the legislative council of the territory of Orleans, declaring that the personal property of a person against whom a *fi. fa.* shall have been directed, is bound by the delivery of the writ to the sheriff, was not changed until the adoption of the Code of Practice.

The plaintiffs obtained judgment against Paxton & Co. in the court of the United States, on the 23d January, 1830, for \$4700, which was signed on the 3d February following, and on the same day a *fi. fa.* issued. In part satisfaction of said judgment, Paxton & Co. transferred to plaintiffs by notorial act, a judgment in their favour in the parish court, for the parish of Orleans, against C. C. Hofner and brig General Morales, for the sum of \$1455. The brig was sold by virtue of the last mentioned judgment, and the proceeds in the hands of the defendant (the Sheriff) was held by him subject to a *fi. fa.* in his hands, which issued on a judgment

obtained in the court of the first district by Ogilvie & Co. Eastern District,  
and Armstrong, against Paxton & Co. June 1831

This suit was brought against the sheriff to recover the funds in his hands, accruing from the judgment obtained by Paxton & Co. against Hofner, and assigned by them to the plaintiffs. Ogilvie & Co. and Armstrong intervened and claimed in virtue of the *fi. fa.* in their favor in the hands of the sheriff. Notice of the assignment was given to the attorney in fact of Hofner, on the 24th March, 1830, and to the attorney in fact of the purchasers of the brig General Morales, whose notes for her price were held by the defendant, on the 16th April, 1830, and notice to the defendant on the same day—it being the day before the notes fell due. The *fi. fa.* in favor of the intervenors was received by the sheriff on the 13th February, 1830, which was anterior to any notice of the transfer of the judgment from Paxton & Co. to the Plaintiffs. There was judgment for the intervenors, and the plaintiffs appealed.

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*Pierce*, for appellants, made the following points.

1st. No execution could issue on the judgment obtained by intervenors, before notice of the judgment.—*C. P. art. 624.*

2d. James Gourlay & Co. or C. C. Hofner, were the persons to whom plaintiffs were bound to give notice. Hofner was the debtor, he owed the judgment to Paxton & Co.; notice was given to his agent here on the 24th March—at that time, and indeed at no time was any notice of intervenors execution given to him—the debt due by him to Paxton & Co. was transferred to plaintiffs, and he notified before any seizure made known to him. Or say, James Gourlay & Co. to be the debtors, (they having bought the vessel, Hofner's property, that was sold to satisfy this judgment of Paxton & Co. vs. Hofner); notice was given to them of the transfer to plaintiffs, and no notice was given by the intervenors of their execution to them.

The code is express, that the transferee is possessed as to

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third persons, after notice has been given to the debtor of the transfer having taken place:—the sheriff was not debtor.

The *fi. fa.* of plaintiffs was prior to intervenors and gave a lein. *Hanna vs. His Creditors*, 12th *Martin*, 66. Morgan was notified before the money came in his hands.

*Sterrett, contra.*

1st. The *fi. fa.* of the intervening party reached the hands of the sheriff before notice of the assignment. The *fi. fa.* bound all the personal property of Paxton on the receipt by the sheriff. *Bainbridge vs. Clay*, 4 *N. S.* p. 56.

2d. The *fi. fa.* did not operate a lein in the hands of the U. S. Marshal.

*Mathews, J.* delivered the opinion of the court.

This suit is against the sheriff, Morgan, to compel him to pay to the plaintiffs \$1455, with interest and damages. They claim the principal sum, as belonging to them by assignment from Samuel Paxton & Co., and interest and damages on account of an illegal detention of it by the defendant. Ogilvie & Co. and Armstrong intervened, and claim this money as having been seized in the hands of the sheriff by an execution which issued on a judgment obtained against the assignors of the plaintiffs. The court below decreed in favour of the intervening party, and the plaintiffs appealed.

The sheriff in this case is a mere stake-holder. The rights of the other parties depend on the facts as made out by them in a statement agreed; from which it appears, on the part of the plaintiffs, that they had obtained a judgment against Paxton & Co. in the District Court of the United States, on the 23d January, 1830, for \$4709 91, which was signed by the judge on the 3d of February following; and that a *fi. fa.* issued on the same day. On the 30th of January, Samuel Paxton, acting for his firm, assigned to the appellants a judgment which Paxton & Co. had previously obtained in the Parish Court of New-Orleans, against one Hofner and the brig General Morales. On this judgment the money now in

dispute came into the hands of the sheriff. It does not appear that notice of the assignment was given to the debtors or their agents until the 24th of March, 1830, and the 16th of April of that year. On the part of the interveners, the statement of facts shews that they obtained judgment against Samuel Paxton & Co. in the District Court of the state, on the 19th of January, 1830, for \$4827 15; that a *fi. fa.* issued on said judgment, which came into the hands of the sheriff on the 13th of February following; and that by virtue of this writ, all claims and rights belonging to Samuel Paxton & Co. were seized, previous to notice of the assignment made by them to the appellants, &c.

The only doubt as to the correctness of the judgment of the District Court, which can possibly be raised on these facts and the law applicable to the case, is based on the execution which issued from the District Court of the United States. By an act of congress, passed on the 26th of May, 1824, it is ordained that "the mode of proceeding in civil causes in the courts of the United States established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the District Courts of that state," &c.

The legislation of the United States having been made in reference to the state laws in force at the time the act was passed, must be considered as embracing their provisions, and not those of state rules of practice which might be subsequently introduced by the legislative power of the state; consequently, for the government of judicial proceedings in the United States courts within the limits of Louisiana, its laws directing the mode of practice in the courts of the state, passed prior to the 26th of May, 1824, must be looked to as the legitimate rules of practice in those of the United States.

In the 14th section of the act of the legislative council of the territory of Orleans, regulating the practice of the superior court in civil cases, it is declared that the personal pro-

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For the government of judicial proceedings in the U. States courts within the limits of Louisiana, its laws directing the mode of practice in the courts of the state, passed prior to the 26th of May 1824, must be looked to as the legitimate rules of practice in those of the U. States, and not those rules of practice which may have been subsequently introduced by the legislative power of the state.

The act of the legislative council of the territory of Orleans declaring that the personal property of a person against whom a *fi. fa.* shall have

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been directed is bound by the delivery of the writ to the sheriff was not changed until the adoption of the Code of Practice.

party of the person against whom a *fi. facias* shall be directed, shall be bound by the delivery of the writ to the sheriff, who was required to endorse thereon the day and hour on which he received it. It is believed that no change was made in this law by the state legislature until the adoption of our Code of Practice, which took place subsequent to the act of congress of 1824.

If the facts were clearly established that the *fi. fa.* which issued from the District Court of the United States reached the hands of the marshal prior to the 13th of February, 1830, perhaps it would give a lien and preference in favor of the appellants on the fund now in dispute. But there is no evidence shewing when it came into the possession of that officer, and we do not believe that any legal presumption fairly arises from the facts as stated, sufficient to destroy the rights of the appellees acquired under their execution, which was delivered to the sheriff on that day, and operated as a seizure of the money in his hands belonging to the defendants, Samuel Paxton & Co.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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PEYTAVIN vs. MAURLN.

APPEAL FROM THE COURT OF THE SECOND DISTRICT  
THE JUDGE OF THE EIGHTH PRESIDING.

In a suit on a note twenty four years after it becomes due, if the testimony does not conclusively establish payment, but presents circumstances to induce the jury to infer that fact, their verdict will not be disturbed.

The declarations of the plaintiffs agent are not legal testimony against the defendant, and should be rejected by the court.

Where a witness was permitted to testify to the contents of an account-book, and after judgment, the party moves for a new trial on the ground that he has discovered where the book is, but does not state that it produced it would contradict the statement of the witness, the new trial will be refused.



The plaintiff, as surviving partner of Reymond & Peytavin, instituted suit in 1827, on a note of the defendant given to the late firm, the 13th September, 1806, for \$974 37, payable one year after date.

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The defendant pleaded the general issue, admitted his signature to the note, but in an amended answer alleged payment.

There was a verdict and judgment for the defendant. The testimony of several persons, formerly in the employ of the late firm of Reymond & Peytavin, shews that payments had been made on account of this note, but none of them positively stated that it had been paid off. A variety of circumstances, and the lapse of time, induced a strong presumption of payment.

The plaintiff moved for a new trial, on the ground of newly discovered evidence. The judge *a quo*, overruled the motion, because the affidavit did not set forth the *nature* of the evidence alleged to have been discovered since the trial.

A witness was offered to prove the declarations of the plaintiff's agent, relative to the books of the firm, which was objected to by defendant as hearsay, and as the mere declarations of an agent. The court sustained the objection, and the plaintiff excepted to its opinion.

The plaintiff appealed.

*Roselius*, for the plaintiff and appellant.


*White*, for the defendant and appellee.

*Porter, J.* delivered the opinion of the court.

This suit was instituted on a promissory note, dated twenty-four years before the filing of the petition. The defence was that it had been paid. Testimony in support of this allegation was offered. It does not clearly nor conclusively establish the fact, but presents circumstances from which the jury, after such a lapse of time, were justified in inferring it. We do not feel inclined or authorized to disturb the verdict.

In a suit on a note twenty four years after it becomes due, if the testimony does not conclusively establish payment but presents circumstances to induce the jury to infer

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DORFEUILLE'S MINORS vs. DUPLESSIS ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The syndics of an insolvent cannot release a mortgage existing on property sold by the insolvent previous to his failure, even to disencumber the property so as to receive the price from the purchaser. Their powers only extend to the discharge of *existing liens* on property surrendered by the insolvents.

Where syndics release a mortgage existing on property sold before the surrender by the insolvent, receive the *price and place it on the tableau* to the credit of the mortgage creditor, who are minors but represented by their under tutor, they still have their recourse on the mortgage property, because they were not cognizant to the fact of the mortgage being released.

The judgment of homologation should cover the whole ground on which the minors claim is resisted, as well that of the release of the mortgage as the payment of the price received for the mortgaged premises, before it can have the effect of *res judicata*.

The facts are fully stated in the opinion of the court.

*Seghers* for the appellants.

*Moreau* and *Canon* for the appellees.

*Porter, J.* delivered the opinion of the court.

The plaintiffs seek to enforce a mortgage which they had on their father's property, on land now in the possession of the defendants.

The premises were once owned by their father, who, about the year 1820, became insolvent, and called a meeting of his creditors. Some years previous to his failure, he had sold the premises to one Guesnon, and Guesnon not paying for the property at the time specified in the contract, an order of seizure and sale was taken out, and the premises sold. At the sale the defendants became the purchasers, and the debt owed by them was transferred by the father of the plaintiffs, the insolvent, to his creditors.

The syndics of an insolvent cannot release a mortgage existing on property sold by the insolvent previous to his failure even to disencum-

The syndics demanded payment, and the defendants refused to make it, unless the mortgage which existed on the property in favour of the minors, who are now plaintiffs, was discharged. The syndics gave the release required, and received the money. This money they carried on the tableau

of distribution. No opposition was made to the receipt of the money by the other creditors, and the minors, represented by their undertutor, made none. The money was subsequently paid to their representative.

The right of the plaintiffs to recover, depends on the solution of two questions, to which the parties, by agreement, have limited the case, waiving all other questions the record might present. The first is, whether the syndics had a right to release the mortgage.

The act of 1817 gives them the authority to grant a discharge of liens existing on any property surrendered by the insolvent. This is to effectuate a sale. But in this instance, the sale having been made before the insolvency, the right of the plaintiffs to enforce their mortgage on the property in the hands of the purchaser, was perfect, and could not be affected by the failure, without an express provision of law to that effect. None such exists; and though it would be convenient there should be, the power would be liable to considerable abuse. The property, in many instances, might be worth more than it was sold for, and a power to release the mortgage would deprive the creditor of a great proportion of his security, if he were compelled to take the money in place of exercising his right on the thing. Such was the case here. The land had been sold by the insolvent several years before, for \$1000;—when sold at sheriff's sale, to enforce the payment of the purchase money, it brought upwards of \$2000. The difference between these two sums was lost to the minors, by the syndics releasing the mortgage.

The second, and rather more difficult question, is, whether the failure on the part of the minors to object to the tableau of distribution, and subsequent receipt of the money, does not prevent them from now having recourse on the land. If knowledge of the release given by the syndics was brought home to their representative, then before the court, it is pos-

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ber the property so as to receive the price from the purchaser. Their power only extends to the discharge of existing liens on property surrendered by the insolvent.

Where syndics release a mortgage existing on property sold before the surrender by the insolvent, receive the price and place it on the tableau to the credit of the mortgage creditors, who are minors but represented by their undertutor, they still have their recourse on the mortgage property, because they were not cognizant to the fact of the mortgage being released.

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The judgment of homologation should cover the whole ground on which the minors' claim is resisted, as well that of the release of the mortgage as the payment of the price for the mortgaged premises before it can have the effect of *res judicata*.

sible it might; but it appears this was a matter carried on between the syndics and purchaser, in which they took no part, and, for aught that is shewn on record, were not even aware of. The appropriating the money to them, in the tableau, gave their representative no information of the fact; for in virtue of their mortgage on the tutor's estate, they had a right to be paid, in preference to other creditors. The judgment of homologation should cover the whole ground on which the minors' claim is rested, or it cannot have the effect of *res judicata*.

We therefore think the plaintiffs have a right to recover: and the next inquiry is, how much. Their claim is made up of two items, the amount inherited from their mother, \$3161 68: and \$900 for their share of the acquets and gains made during the marriage. The evidence satisfies us there were no gains, and that the whole amount due the plaintiffs is the sum first mentioned; from which must be deducted \$960, paid by the syndics, which will leave a balance due of \$2108 68.

This balance the defendants contend must be still further reduced in the sum of \$710, objects purchased at the sale of the insolvent's estate, on account of the minors, and carried into the tableau of distribution as so much to their debit.— This item we think should be allowed. It was confirmed by the judgment of the court homologating the tableau, and as the minors were parties to the action and duly represented, the decree has the force of *res judicata*, and cannot be collaterally examined and set aside in this suit.—5 N. S. 165. This sum of \$710 taken from \$2108 68, leaves \$1398 68, with interest at five per centum from 13th January, 1821, until paid.

It is therefore ordered, adjudged and decreed, that the plaintiffs do recover of the defendants the sum of thirteen hundred and ninety-eight dollars and sixty-eight cents, with interest from the 13th of January, 1821, until paid, at five per centum, unless within ten days after the notification of

this judgment they give up the mortgaged premises to the plaintiffs; and if they do, it is then ordered and decreed that the said premises be seized and sold, to satisfy the above sum of thirteen hundred and ninety-eight dollars and sixty-eight cents, with interest at five per centum from the 13th January, 1821, until paid, and costs of suit.

Eastern District,  
June 1831.

  
DONFEVILLE'S  
MINORS  
vs.  
DUPLESSIS & AL

**FLORANCE vs. MERCIER.**

**APPEAL FROM THE COURT OF THE FIRST DISTRICT.**

The recorder of mortgages is forbidden to refuse or delay the recording of any instrument, importing or stipulating a privilege or mortgage, presented to him for that purpose; but must do it in the order of time, and without leaving any blank space between the acts, as presented.

So where a builder contracts with the *owner* to build a house, and enters into a written agreement with third persons to *slate it*—the former acquires a privilege, to which the latter on certain events happening, may be subrogated.

The builders and material men's privilege must be recorded, in the office of the recorder of mortgages, to have effect against third persons.

The recorder of mortgages is liable in damages to the party aggrieved, for omitting to record, and cannot cancel a mortgage without the party, whose right is thereby destroyed, has been heard.

The plaintiff alleges he has applied to the defendant, who is recorder of mortgages for the city and parish of New Orleans, for a certificate to shew there is no privilege or mortgage on a house and lot belonging to him, on the corner of New Levee and Julia streets, except one in favor of the Bank of the United States, and the recorder refuses to grant the certificate, in the form he requires it. He prays that the recorder may be compelled to grant the certificate, and pay him \$500 damages for the refusal and delay.

The recorder in his answer says, he has always been ready and willing to grant the certificate, according to the tenor of his books. But that there is a builder, or undertakers *contract* with certain persons to *slate* the roof of the house, built on the plaintiffs lot, which is recorded in his office, importing

Eastern District, a *lien* on the house, which it is his duty to set forth in the certificate.  
June 1881.

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FLORENCE
vs.
MERCIER.

It was admitted on the trial, that this instrument had been recorded, "on the 4th of March, 1829, and cancelled by the recorder of mortgages on the 18th of June, 1830, on production to him of proof, that the sum therein stipulated had been paid." And also, that O. Fagan, one of the persons who contracted to slate the house was dead, and Hunter, the other one, was absent.

The district judge gave judgment, that the recorder should omit the builder and undertakers act in his certificate, on the ground "that the recording it, created no lien or privilege whatever, upon either the lot or building"—"and that the transfer of property ought not to be embarrassed by the recording such acts, &c."

The defendant appealed.

Slidell, for the plaintiff.

Mercier and *Dennis* for defendant.

Martin, J. delivered the opinion of the court.

Roe & Allison, having undertaken to build a house for the plaintiff, contracted with *Hunter & Fagan*, for the slating of the roof. The latter had the contract registered by the defendant, who is register of mortgages. The plaintiff wishing to dispose of the house, applied for his certificate, and the defendant refused to give one, unless with a mention of the contract of the slateing with the plaintiffs undertaker.

The present suit is brought to compel the delivery of a certificate, without a mention of this contract, and for damages.

The district court was of opinion, "that the defendant had mistaken the law—that it is not the recording of an account which creates a mortgage or lien—the recording gives effect to the mortgage or lien—that it was very clear, the act in the present case, gave no mortgages whatever on the

house, and its being recorded does not help it—that the transfer of property ought not to be embarrassed by the record of acts which give no lien, and the recorder ought to look to it.” The defendant was accordingly decreed to give the required certificate, and pay costs. He appealed.

As this judgment acted on a privilege claimed by a third party, who was not before the court, the case must be a very plain one, if any there may be, that could authorize a deduction or diminution of his claim, without his being heard.

The defendant is forbidden to refuse, or delay *in any case*, the recording of acts presented to him for that purpose, (3355) and this he must do in due order, and without leaving any interval or blank space between the acts, (3356.) Not a moment is allowed him for reflection on the first act presented; if another be immediately offered, he cannot delay either. He cannot leave any blank space or intervals for the first, and register the second, on which no doubt arises—neither can he register the second first.

But it is true, the acts which the legislature speaks of, and orders the recorder to register, must be intended to be such only, on which a privilege or a mortgage *may* be claimed—not love letters or challenges to fight.

In the present case, the slaters knew that the undertakers *acquired* under their contract a *privilege*, (2743) to which by their contract with them they were, on certain events happening, *subrogated*; (2744) that the above privileges could not be exercised against third persons, without being recorded, (2746). On this they presented the contract, which was to be the evidence of their subrogation, to the privilege for registry, that the neglect of this formality might not render this privilege unavailable against third parties, the registry took place. Were it admitted, that the recorder erred and made himself liable for damages to the party aggrieved; we cannot see that the case authorizes us to destroy whatever right the slaters may have acquired by the registry, without they

Eastern District,
June 1831.

FLORENCE
vs.
MERCIER.

The recorder of mortgages is forbidden to refuse or delay the recording of any instrument importing or stipulating a privilege or mortgage presented to him for that purpose; but must do it in the order of time and without leaving any blank space between the acts as presented.

So where a builder contracts with the owner to build a house, and enters into an agreement with third persons to slate it, the former acquires a privilege to which the latter on certain events happening, may be subrogated.

The builders and material men's privilege must be recorded in the office of the recorder of mortgages to have effect against third persons.

The recorder of mortgages is lia-

Eastern District,
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FLORENCE
vs
MERCIER

ble in damages to
the party aggrieved
for omitting to
record, and cannot
cancel a mortgage
without the party
whose right is
thereby destroyed,
has been heard.

being heard, or having had the opportunity of being so. We think the district judge erred in doing so.

Were we of opinion that he is liable in damages, as the judgment does not decree any, and the appellee has not asked us to amend the judgment, we cannot do it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both cases.

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FOSSIER vs. HERRIES.

**APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.**

In a contract to build, if the owner consent to a deviation from the original plan, he is liable to the undertaker for such extra work as may be caused by the change.

The plaintiff and defendant entered into a written contract, by which the former undertook to construct a building agreeably to a plan furnished at the time. It was afterwards found necessary, in consequence of the form of the lot, to deviate from the original plan. This alteration was communicated to the defendant, who acquiesced in the change, and observed to the plaintiff he should risk nothing by it. This action was brought to recover for extra work, &c. There was judgment for the plaintiff, and the defendant appealed.

Janin for appellant.

Pitot for appellee.

Mathews, J. delivered the opinion of the court.

This is a case in which an undertaker of a building sues for a balance due on a written contract, and also for the value of extra labour done on said building, by the consent of the owner. The plaintiff obtained judgment in the court below, from which the defendant appealed.

It appears by the evidence of the case, that a written con-

tract was entered into by the parties, in which the plan of the house to be constructed was delineated, and which represented a building of right-angles, to be made of wood filled in with bricks. After the workmen had prepared the timbers to be united in a rectangular edifice, according to the plan, it was found that the form of the lot on which the house was to be constructed, did not correspond with said plan, which rendered alterations necessary. The defendant was present when this discovery was made, and told the undertaker to proceed to make the necessary changes, and that he should risk nothing thereby.

The testimony of witnesses establishes the value of the extra work corresponding to the judgment of the Parish Court, which we believe to be well founded, both in law and the facts of the case.

It is therefore ordered, adjudged, and decreed, that the judgment of the court below be affirmed with costs, &c.

Eastern District,
June 1881.

FOSSIER
vs.
HERRINS.

In a contract to build if the owner consent to a deviation from the original plan, he is liable to the undertaker for such extra work as may be caused by the change.

SIBLEY vs. FIELD.

APPEAL FROM THE COURT OF THE SECOND DISTRICT.

The supreme court will not proceed to the examination of a case in which it is not evident that the whole record is before them.

Martin, J. delivered the opinion of the court.

The clerk's certificate informs us that the transcript is complete, "except as to such papers as may have been annexed to a dedimus, which was not returned in time, and which were formerly on file."

The appellant has not moved for a *certiorari* to have these papers brought up, and we cannot proceed to the examination of a case, in which it is not evident that the whole record is before us.

It is therefore ordered that the appeal be dismissed, with costs.

The supreme court will not proceed to an examination of a case in which it is not evident that the whole record is before them.

Eastern District, *MAHER vs. BROWN—HENNEN & GRIMES-INTERVENING.*
June 1881.

MAHER
vs.
BROWN

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW ORLEANS.

An attaching creditor has a right to call for proof of the consideration of an assignment which is opposed to him

Where the proof of that consideration is incomplete he may avail himself of the defect.

The plaintiff attached certain moneys in the hands of Prieur, mayor of the city, which was claimed by the intervening parties, (attorneys at law) under the following assignment from the defendant:

"D. Prieur, Esq, Mayor of the city of New-Orleans;

"Please deliver to Messrs. J. R. Grymes and Alfred Hennen, the pocket-book belonging to me, and the money therein contained, whatever may be the amount—which I have, and do hereby assign, cede, and transfer unto them, for value received.

(Signed)

DAN. BROWN."

It was in evidence that this assignment, which was for professional services rendered by the interveners, was served upon the mayor about ten minutes previous to the service of the attachment. There was judgment for the plaintiff for the amount of his claim, and the intervening parties appealed.

Hennen and Grymes for appellant.

Preston for appellee.

Martin, J. delivered the opinion of the court.

Process of attachment was levied on a pocket-book containing \$4299, moneys of the defendant, in the possession of the mayor. The money was denied to be the defendant's, and the general issue was pleaded.

Hennen and Grymes filed a petition of intervention, claiming the money attached as their own under an assignment from the defendant, notified to the mayor before the service of the attachment.

To this petition the plaintiff answered, that the interven-

ing parties were entitled to a reasonable fee out of the property attached, for defending the defendant on a criminal prosecution, and gave no other consideration for the assignment claimed by them.

There was a verdict, and judgment in favour of the plaintiff for \$1186 45, and costs; and in favour of the intervening parties for the balance. They made an unsuccessful attempt to obtain a new trial, and appealed.

The record shews that on the day the attachment was sued out, the intervening parties accompanied the defendant to the mayor's office, for the purpose of assisting him to obtain from the mayor, the pocket-book of the defendant, containing a large sum of money, (the exact amount was unknown to him;) and one of the intervening parties stated to the mayor, "in order to induce him to relinquish the pocket-book, that his keeping it was precluding the defendant from all possibility of getting back, or of procuring counsel to defend him." On the magistrate's persisting in his refusal, the other intervening party drew the following assignment:

"New-Orleans, February 1st, 1831.

"A. Prieur, Esq. Mayor, &c.

"Sir—Please to deliver to Messrs. A. Hennen and J. R. Grymes, the pocket-book belonging to me, and all the money therein contained, whatever may be the amount—which I have, and do hereby assign, cede, and transfer to them, for value received."

This assignment having received the defendant's signature, was immediately notified to the mayor, who, on the suggestion of a gentleman of the bar who was accidentally present, noted on the assignment the date of the notice. A short time after, the sheriff's officer came and served the attachment.

In this court the intervening parties have contended, that the assignment and the notice to the mayor had vested an

Eastern District,
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MAHER
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MAHER
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An attaching creditor has a right to call for proof of the consideration of an assignment which is opposed to him.

Where the proof of the consideration is incomplete he may avail himself of the defect.

indefeasible right in them to the book and its contents, which the posterior service of the attachment did not affect.

It does not appear to us that the principle of law contended for by the intervening party, can be contested otherwise than on the score of the absence of a valid consideration.

The evidence fully establishes the plaintiff's claim. One of the intervening parties was directed by the defendant to confess judgment for it.

There is no evidence of any consideration for the assignment, except what results from the words "for value received," and from the relation of counsel and client, between the assignees and assignor.

The case presents two questions: 1st, Whether an attaching creditor has a right to call for proof of the consideration of an assignment which is opposed to him? 2d, Whether when the proof of that consideration is incomplete, he may avail himself of the defect?

I. The statement of the first question shows that there is no difficulty in the answer. The attaching creditor cannot be deprived of his lien and the right resulting from it, unless by a person who has previously acquired the property of the thing attached; and if the validity of the consideration be a necessary ingredient in the right of the assignee, the proof must come from him who alleges the assignment; for his opponents cannot prove a negative. It is clear of any doubt that it is a *bona fide* assignment alone which can be successfully opposed to the attaching creditor; and if proof of the validity of the consideration could not be demanded, this would be tantamount to a declaration that a fraudulent or collusive assignment might have that effect.

When the object of the assignment is to secure a debt, and the thing assigned is evidently of a value far beyond it, the overplus may, perhaps, be liable to the claim of the attaching creditor.

When the inadequacy of the price is enormous, it may fur-

nish ground to presume fraud, or violence, or error might be presented as reasons for shewing that the free consent of the transferrer was wanting.

Eastern District,
June 1831

MAHER
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II. There may be cases, in which the consideration not being complete, such as inadequacy of price, or circumstances personal to the parties to the assignment, may not be available to the attaching creditor; but in the present case, the incompleteness of the consideration is of a nature which enables the plaintiff to urge it.

The testimony does not shew that it was ever understood between the intervening parties and the defendant, that the latter was indebted to the former in any specific sum, or that the whole amount in the pocket-book was intended as a fee for them. On the contrary, their own witness shews they solicited the mayor to relinquish the pocket-book, not for their own benefit exclusively, but for the double purpose of the defendant's obtaining a succour, and being enabled to allow them a compensation. Had the mayor, acceding to the proposition, handed the money to the intervening parties, and the sheriff's officer instantly served the attachment on them, the claim of the attaching creditor to what exceeded a fair remuneration, could not have been resisted. In what succeeded the refusal of the mayor, viz. the writing, signature, and notice to the mayor, till the service of the attachment, the jury have not seen; neither can we discover any evidence of a liquidation or payment of the demands of the intervening party. They have given no evidence of the value of their services.

The jury have been of opinion that a fee of three thousand and odd dollars was a fair compensation, and that a sufficient sum remained in the mayor's hands, after paying the plaintiff, to afford a proper remuneration to the intervening parties. The first judge has expressed himself satisfied with that verdict, and it does not appear to us that he or they erred.

Eastern District,
June 1931.

ROUSSEAU
vs.
CHASE.

nulled, and the verdict of the jury set aside. And it is further ordered, adjudged and decreed, that the defendant and appellee, do reconvey to the plaintiff and appellant, all the right, title and interest, which the former acquired to the tract of land now claimed by the latter, by virtue of the sale for taxes, within ten days from the notification of this judgment, and so soon as the plaintiff and appellant shall pay to him, or deposit for his use in any of the banks of this state, the price, with interest thereon, demandable by law, which he the said defendant and appellee paid for said land, under the sale for taxes. And it is also ordered, that the defendant and appellee, pay costs in both courts.

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*MARIGNY, ASSIGNEE OF A. BOSQUE & P. MARIGNY vs.
ZENON NIVET, ET AL.*

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If pending a suit the plaintiff sells his title, or the property in contest to another, the purchaser may intervene and become a party to the action.

The act of adjudication confers a complete title to the object or property sold, on the purchaser, without any deed or act passed before a notary by the seller.

And the purchaser who buys according to certain definite and fixed boundaries, described in the act of adjudication, takes all the lands between such bounds, although it gives him a greater quantity than that called for in his title.

A purchaser who accepts a deed for a less quantity than what is contained in the act of adjudication, does not thereby lose the right he has acquired to a larger amount of property under the sale.

The acceptance of a deed, under such circumstances, is in the nature of a contract entered into by the purchaser *in error*, of the rights he already possessed, and as such, is not binding on him.

Agenor Bosque, under whom the plaintiffs claim, purchased a plantation in the parish of Plaquemines, at the sale of the succession of Margurite Troxler, wife of Paturel, containing eleven and two-third arpents front, by the depth of forty: and described in the act of adjudication by certain metes and bounds. On actual measurement, made according to

the boundaries described in the act of sale and adjudication, if was found to contain thirteen arpents and twenty-two toises. The curator of the succession limited Bosque, the purchaser, to the *quantity of arpents* purchased, and afterwards sold the surplus of one arpent and twenty-two toises, as still remaining a part of the succession.

Eastern District,
June 1881.

MARYGNY
vs.
NIVET ET AL

This suit is instituted to recover possession of this surplus as being included in the original adjudication to Bosque.— This district judge decided, that by the terms of the adjudication, a complete title was conferred on the purchaser of the plantation, *according to the defined boundaries*, which controls the call for quantity. The plaintiffs had judgment for the surplus of one arpent and twenty-two toises, as having been included in the original purchase by their assignor, Bosque.

Bosque had accepted a deed from the curator, limiting him to the quantity of eleven and two-third arpents, and when the surplus was ascertained and sold, as still remaining a part of the succession, he attended and bid for it; but the defendant Nivet, became the purchaser. The district judge decided, that this acceptance by Bosque was made through error, and was by no means a renunciation of his rights under the first sale.

The defendant Nivet, and the heirs of Madame Troxler, whom he cited in warrant, appealed.

Pitot, for the plaintiffs and appellees.

Denis, Vinot and *M^cCaleb*, for the defendants and appellants.

Porter, J. delivered the opinion of the court.

At the sale of the effects of the succession of a certain Margurite Troxler, deceased, Bosque, one of the plaintiffs in this suit, became the purchaser of a tract of land, under the following designation:

“A plantation, situated in the parish of Plaquemines, on the right bank of the Mississippi, at about twenty-six miles be-

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June 1881.

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MARIGNY

vs

NIVET ET AL.

low the city of New-Orleans, said plantation measuring eleven and two-third arpents, fronting said river, with the ordinary depth of forty arpents, bounded on the upper line by the property belonging to the estate of the late Antoine Paturel, and on the lower line by that of Jean Salvant, together with a dwelling house, and other out houses thereon, and thereunto belonging, fences, &c. adjudged for the price of \$10,300.

Previous to the purchaser giving his notes for the price, conformable to the terms of the sale, a survey was made of the premises, the eleven and two-third arpents, mentioned in the deed of sale, were measured off, and boundaries planted. This survey shewed that the quantity just mentioned, did not embrace all the land contained within the boundaries expressed in the adjudication; that one arpent and twenty-two toises still remained. Bosque, however, accepted the eleven arpents and two-thirds, as the quantity bought by him, took a bill of sale from the curator, with boundaries conformable to this quantity, giving for upper limit lands of the succession, instead of those of Paturel, as mentioned in the adjudication, and gave his notes for the purchase money. The curator of the succession, afterwards had an inventory made of the one arpent and twenty-two toises, and exposed it for sale. At the auction, Bosque appeared and bid for the land, but it was finally adjudged to the defendant Nivet.

This took place in the year 1829, in the month of February, and in November of the same year, this action was instituted.

The defendants have called in warrantee, the heirs of Troxler, amounting to forty-seven in number, who by their answer, have put at issue the plaintiffs right to recover.

The court below gave judgment however in their favor, and decreed that the possessors should recover over against their warranters, the amount paid for the premises. The latter have appealed.

Pending the suit, Prosper Marigny, one of the plaintiffs, sold to Gustave Marigny, the title in the premises which he

had acquired from Bosque, the original purchaser. A motion was made to make the vendee of Prosper, a party to the suit. It was opposed, but the court allowed him to become plaintiff. It has been contended here, that the judge erred in permitting this addition to the parties.

We think he did not: a third party, who has an interest in a cause, may intervene. Such is the general principle. There is no law which forbids the sale and purchase of land for which a suit is pending, nor any which prevents the buyer from becoming a party to the action, and watching over the rights he has acquired. The proceeding does not in any respect, impose additional burthen on the defendant, and it increases his security for costs.

The counsel for defendants have argued this, as a case in which the intention of the parties, must control the expressions in the act of adjudication. They admit that if that act stood alone, the plaintiffs could recover, but insist that the acceptance of the deed of sale, by different limits, shews that the quantity mentioned in the adjudication, was that which formed the object of the contract, not that contained in the boundaries.

The plaintiff replies, that his acceptance of the sale, was caused by an error, in regard to the rights previously acquired by him—that if the quantity had been less than the eleven and two-third arpents, he could have been compelled to pay the whole price, and that where he took the risk of a lesser quantity, he has a right to any surplus that may exist.

The first question is, whether the adjudication conferred a title to the land sold, without a deed from the curator? and the second is, if it did, to what quantity?

We have positive provisions of law on both these questions.

By the 2586 article of the Louisiana Code, it is provided, that the "adjudication is the completion of the sale, the purchaser becomes the owner of the object adjudged, and the contract is from that time, subjected to the same rules which govern the ordinary contract of sale."

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June 1831.

MARIGNY

vs.

NIVET ET AL.

If pending a suit the plaintiff sells his title on the property in contest to another, the purchaser may intervene and become a party to action.

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June 1831.

MARIGNY
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NIVET ET AL.

The act of adjudication, confers a complete title to the object or property sold, on the purchaser, without any deed, or act passed before a notary, by the seller.

And the purchaser, who buys according to certain definite and fixed boundaries, described in the act of adjudication, takes all the lands between such bounds although it gives him a greater quantity, than that called for in his title.

A purchaser who accepts a deed, for a less quantity than what is contained in the act of adjudication, does not thereby lose the right he has acquired to a larger amount of property under the sale.

The acceptance of a deed, under such circumstances, is in the nature of a contract entered into by the purchaser in error of the rights he already possessed, and as such is not binding on him.

The 2601, is still more explicit, it declares the adjudication to be a complete title, and need not be followed by an act passed before a notary.

The deed therefore, by the curator, could confer no better title. The buyer was the owner of every thing stricken off to him.

The second question is solved by an article of the same work. If any one sells, or alienates a piece of land, from one fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds, although it give him a greater quantity of land than is called for in his title. and although the surplus exceed the twentieth part of the quantity mentioned in his title.—*Louisiana Code*, 850.

It is clear, therefore, that the purchaser, in this instance, did acquire all the lands contained between the boundaries mentioned in the act of adjudication.

We must now inquire if he has lost them?

The acceptance of a deed of sale, containing other boundaries, does not in our opinion destroy the right previously acquired. The terms used in it, negative all idea of the parties intending to modify or change the original contract. It refers to the sale at auction, and professes to carry it into effect. There is no consideration expressed in it for the renunciation, or abandonment of the rights the purchaser had acquired by the adjudication. It does not express, what cannot be presumed, a donation—it can be regarded in no other light, than a contract entered into by the purchaser, in error of the rights which he already possessed, and as such, is not binding on him.

The bidding at the second sale, for property which was already his, is conclusive evidence of this error; and prevents the party to whom it was adjudicated, from claiming any advantage from the acquiescence of the plaintiff in the sale.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

On application for a rehearing, it is ordered, adjudged and decreed, by consent of parties, that the judgment of the district court be annulled and reversed; and it is further ordered and adjudged and decreed, that the plaintiff do recover of the defendant one arpent and twenty-two toises of land, in front, with the ordinary depth, having the limits mentioned in the petition, together with the costs of the court of the first instance, those of appeal to be paid by the appellees.

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June 1831.

MARIGNY
vs.
NIVET ET AL.

CALDWELL vs. BLOOMFIELD.

**AN APPLICATION FOR A MANDAMUS TO THE JUDGE OF
THE FIRST DISTRICT.**

If an insolvent debtor, in actual custody, applies for the benefit of the insolvent laws, makes a cession of his property, which is not accepted by his creditors, who do not attend, and the sheriff is appointed syndic by the court, to receive the cession, the debtor is thereby discharged from his confinement in the same manner as if the creditors had attended and accepted the surrender.

Where creditors are cited at the instance of an insolvent debtor in actual custody, to attend before a notary and receive a surrender of his property, and fail to attend, or make opposition to the homologation of the proceedings within ten days after they are returned into court, they have the authority of *res judicata*, and cannot be disregarded by the creditors.

A surrender of property by an insolvent debtor in confinement operates a discharge of his person from imprisonment, when not opposed, and there is no breach of the conditions of the bond, occasioned thereby, which will make the obligor and his securities responsible to the plaintiff in execution.

The defendant was imprisoned on a *ca. sa.* by the plaintiff and made a surrender of his property before a notary, at which his creditors failed to attend. The proceedings were returned into court, and at the expiration of ten days were homologated, without opposition, and the defendant discharged out of custody, without any formal order of court. The plaintiff urged, that as the defendant left his imprisonment, he had forfeited his prison bond, and made himself and surety liable on it. He applied to the district judge for

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vs.
BLOOMFIELD.

a rule on the sheriff to assign the prison bond to him, that he might have it enforced against the defendant and his surety. The district judge refused the application, and the plaintiff presented his petition to the supreme court, praying for a mandamus, directed to the district judge, commanding him to grant the rule on the sheriff to assign the bond. The court granted a rule on the judge to shew cause why he should not comply with the request of the plaintiff. The judge answered, that he considered the surrender to operate a release and discharge of the person of the debtor from all anterior debts, when no charge of fraud, or opposition to the proceedings on the surrender, was made within ten days: and that there was no breach of the condition of the prison bond. On hearing the case, the court discharged the rule, and refused the *mandamus*.

Mace for the applicant.

Porter, J. delivered the opinion of the court.

A rule was taken on the judge of the first district to shew cause why he should not direct the sheriff of the parish of New-Orleans, to assign to the plaintiff a bond given by the defendant to keep the prison bounds.

The obligor, it appears, went beyond the limits assigned to him; but he did so after he had applied for the benefit of the laws made for the relief of insolvent debtors, and not until after the cession offered by him had been unobjected to before the notary, the proceedings returned into court, and no opposition made within ten days thereafter.

The act of 1817 provides that if creditors do not attend the meeting called before a notary, and appoint a syndic, the court shall authorize the sheriff to receive the surrender of the property, and perform the duties of syndic: and it declares, that if no opposition is made within ten days after the proceedings had before the notary are returned into court, that the insolvent debtor shall be relieved and discharged

It an insolvent debtor, in actual custody, applies for the benefit of the insolvent laws, makes a cession of his property, which is not accepted by his creditors who do not attend, and

from every imprisonment for debts previously contracted. The Louisiana Code also provides that the surrender made according to the forms of law, operates the discharge of the restraint of the debtor's person, and delivers him from actual imprisonment.—*Moreau's Dig. vol. 2, 429, sec. 18. 432, sec. 27 and 29. La. Code, 2172.*

The plaintiff insists the rule should be absolute,

1st, Because the debtor was in actual custody, and being so could not claim, and cannot enjoy, the advantages conferred by the act of 1817.

2d, Because the judge's order did not direct the debtor to be discharged out of custody.

I. The first proposition may, or may not, be true; but as the plaintiff was regularly cited to appear before the notary, and did not attend, and as he failed to make opposition before the court when the proceedings were returned there, the regularity of these proceedings cannot be examined in this way. They have the authority of *res judicata* until appealed from, or set aside by an action of nullity.

II. Whether an officer who had a debtor in actual, and not constructive custody, might not refuse to take on him to judge of the regularity of the proceedings from which it follows as a consequence the debtor is released from imprisonment, and require an actual order from the court to that effect, we need not in this case inquire: perhaps he might. The question presented here, is, whether there has been such a breach of the condition of the bond as makes the obligor and his sureties responsible to the plaintiff in execution? The answer is found in the law already cited, which makes the surrender operate a discharge of the restraint of the debtor's person, and delivers him from confinement. A judgment of the court could not add to the effect of this provision,

Let the rule be discharged, at the costs of the applicant.

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Eastern District,
June 1831.

CALDWELL
vs.
BLOOMFIELD.

the sheriff is appointed syndic by the court to receive the cession, the debtor is thereby discharged from his confinement, in the same manner as if the creditors had attended and accepted the surrender.

Where reditcons are cited at the instance of an insolvent debtor in actual custody, to attend before a notary and receive a surrender of his property, and fail to attend or make opposition to the homologation of the proceedings within ten days after they are returned into court, they have the authority of *res judicata*, and cannot be disregarded by the creditors.

A surrender of property by an insolvent debtor in confinement operates a discharge of his person from imprisonment when not opposed, and there is no breach of the conditions of the bond occasioned thereby which will make the obligor and his securities responsible to the plaintiff in execution.

Eastern District.
June 1831.

CORRYOLLES
vs
MOSSY

CORRYOLLES vs. MOSSY.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

By the English courts it was considered a breach of faith, on the part of the vender, to employ bidders or puffers at auction. If the owner wished to prevent a sale under a certain price, he must proclaim the lowest bid he would take in putting up his goods.

The purchaser could avoid a sale at auction, made by the aid of puffers or private bidders, on the ground that his assent had been obtained by fraudulent practices, on the part of the vender, or his agent.

A purchase made at auction, is similar to a private contract. In both assent is necessary in each party. And an offer to sell at auction, to the highest bidder, is not binding, unless the auctioneer assent to the bid that is made.

So where property is put up at auction, and the plaintiff becomes the highest bidder, the auctioneer may reject his bid, and withdraw the property, unless he will bid a certain sum more.

The plaintiff bid \$2050 on certain lots offered by the defendant as auctioneer, at public sale. The advertisement stated the lots were to be sold to the *highest bidder*. The auctioneer bid \$50 over the plaintiff's bid, and withdrew the property from sale.

The plaintiff institutes this suit to compel the auctioneer to adjudicate the property to him at the *price* of \$2050, which he contends is the *highest* bid, the auctioneer having no right to bid.

There was judgment in favour of the defendant.

Pichot for the plaintiff and appellant.

Morphy for the defendant.

Porter, J. delivered the opinion of the case.

The defendant was employed as auctioneer, to dispose by public sale of certain lots lying in the suburb Marigny. They were advertised in the usual way, and the advertisement contained an express declaration, that they would be sold to the highest bidder. The plaintiff attended the sale, and bid higher than any other person except the auctioneer, who being directed not to sell them for less than a certain sum, advanced on the bid of the plaintiff, and then withdrew the property.

This action is brought to compel the auctioneer to make a conveyance to the plaintiff, on the ground that he was the highest and last bidder.

The judge of the court of the first instance was of opinion that no action lay against the defendant, and dismissed the petition. He was also of opinion that under the 2585th and 2586th articles of the Louisiana Code there was no sale, and that until an adjudication the owner might withdraw the property.

The English and American cases on the subject of owners employing puffers at auction, have been collected in *Livermore on Agency*, and by Chancellor Kent in his Commentaries. The first English decisions went so far as to consider it a breach of faith, on the part of the vender, to employ any one to bid for him at an auction, or to privately bid on his own goods. They established, that if he wished to prevent a sale at an under price, he must order them to be put at his own price. This was the doctrine of Lord Mansfield. Very eminent judges of that country, however, have since questioned whether the rule had not been laid down too broadly. Sir William Grant seemed to think that if bidders were employed by the owners, merely for the purpose of taking advantage of the eagerness of those who were *bona fide*, and in order to screw them up and enhance the price, it would be a fraud; but that he might lawfully, even without making the fact publicly known, employ a person to bid for defensive precaution, and with a view to prevent a sale at an under value. Lord Rosslyn, in the case of *Steele vs. Ellmaker*, suggested that the tone of Lord Mansfield's morality was perhaps too lofty for the common transaction of business; Chancellor Kent, however, is of opinion that it is not; and seems to consider that good faith and sound policy, both require an adherence to the rules established by the earlier cases. He intimates, too, that such is the later decisions of Westminster Hall. If there be any such, they have not fallen under our observation.—*Kent's Com.* vol. 2, 426 and 427. *Livermore on Agency*, 335 and 346.

Eastern District,
June 1821.

CORRYOLLES
VS.
MOSSY.

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CORRYOLLES
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MOSSY.

The purchaser could avoid a sale at auction made by the aid of puffers or private bidders on the ground that his assent had been obtained by fraudulent practices on the part of the vender or his agent.

The case now presented does not require this court to state what conclusion it would come to, on facts similar to those which have produced the difference of opinion just alluded to. In all these cases the adjudication had taken place; the contract was complete so far as a proposition on one side, and acceptance on the other could make it; and it was the purchaser who sought to avoid it, on the ground that his assent had been obtained by fraudulent practices on the part of the vender, or his agents. In the present instance, an attempt is made to carry the doctrine much further, and to make these alleged acts of fraud not merely the means of avoiding a contract, but to lay them as grounds for declaring one to exist, although the party by whom they were practised, failing to draw the bidder up to the price he wished to obtain, refused his assent to the proposition made to him.

To this length we cannot go. The books quoted by the counsel for plaintiff, lay down the rule that a bidding at auction may be retracted before the hammer is down: that every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to.—2 *Kent's Com.* 424. *Payne vs. Cane*, 3 *Term*, 148.

The rule thus laid down would decide this case in favour of the defendant; but as we prefer settling cases, when we can, on the positive provisions of our law, instead of those of other countries, we shall recur to our Code for the rules which must govern us.

A purchase made at auction is similar to a private contract: in both assent is necessary in each party. And an offer to sell at auction to the highest bidder, is not binding unless the auctioneer assent to the bid that is made.

We cannot distinguish between a proposition made to purchase at auction, from that which may take place in a private contract. Assent is required from both parties, in each mode of contracting, before the agreement is complete. The offer of the proprietor to sell to the highest bidder, is not more binding on him than if he had offered, by a private communication to a purchaser, to take a sum certain for his property.

Would that proposition, if accepted, bind the owner? No; for after the acceptance he could still retract. The 1795th

article of the Louisiana Code expressly declares that "the party proposing shall be presumed to continue in the intention which his proposal expressed, if on receiving the unqualified assent of him to whom the proposition is made, *he does not signify the change of his intention*. That change of intention was signified in this instance, and the case does not come within the exception in the next article—of a proposition being made in such terms as evince *a design* of giving the other party the right of concluding the contract by his assent. That design can hardly be presumed, in a case where three parties might successively bid \$100, \$200, and \$300, for property worth thousands.—*La. Code*, 1795 and 1796.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

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vs.
MOSSY,

So where property is put up at auction and the plaintiff becomes the highest bidder the auctioneer may reject his bid, and withdraw the property unless he will bid a certain sum more.

WORKMAN vs. INSURANCE COMPANY.

**APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.**

The intention both of the obligor and obligee must be sought for in the true meaning and spirit under which the agreement was made, as expressed in the written instrument.

In the construction of every instrument the ordinary and legal meaning of words must be taken into consideration.

The common and ordinary acceptation of the word *house*, embraces every thing appurtenant and accessory to the main building; so in legal acceptation, the sale of a house carries along with it whatever may be necessary to a full and complete enjoyment of the thing sold.

Where a house is insured, the back buildings will be considered as accessories to the main building, and embraced by the policy.

The facts are stated in the opinion of the court, delivered by

Mathews, J.

This is a suit brought on a policy of insurance, as set forth in the petition, to obtain indemnity for the loss of property consumed by fire.

The cause was submitted to a jury in the court below,

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WORKMAN
vs.
INS. CO.

who found a verdict in favour of the plaintiff for the value of the property destroyed, and also assessed damages against the defendants, for a noncompliance with the obligations of their contract. Judgment being rendered in pursuance of this verdict, the latter appealed.

The only difficulty which occurs in the decision of this case, arises out of the description of the property insured, being too general and indefinite to give that clearness and certainty, which it is desirable should prevail in all contracts. The property on which the insurance was effected is described to be "two houses, situate in Dorsier-street, adjoining the City Hotel, between Custom-House and Canal-streets, being Nos. 5 and 7, in the city of New-Orleans, in equal portions, ten thousand dollars," &c.

Following this description of the property and price fixed, the obligations assumed by the company are expressed, under sundry conditions, either suspensive or in avoidance of the contract, all on the same page, signed by its proper officer, with its seal affixed. On the third page of the same sheet of paper, are found a number of articles, purporting to be conditions of insurance, as established by the company. The first of these articles states that "persons applying for insurance on buildings, are to deliver into the office the following particulars, viz. of what materials the walls and roof of each building are constructed, as well as the construction of buildings contiguous thereto; whether the same are occupied as private dwellings, or how otherwise; where situated; also the name or names of the present occupiers. Each building must be separately valued, and a specified sum insured thereon," &c.

The evidence of the case shews that the main houses, or building insured, are situated in the place designated in the description as contained in the body of the policy; that they are used as counting and store-houses; that the whole lot on which they are placed, is enclosed by the outer walls of these houses and a continuation of said walls to the extreme rear

of the lot, where two other smaller houses are built, for the purpose of storing merchandise, leaving a small yard between the front and rear buildings, on the ends of which are kitchens and privies, for the use of the occupants of the counting-houses. On the 31st of March, 1830, the two houses in the rear were entirely destroyed by fire, as well as the kitchens and privies, and a slight injury done to the main buildings. The loss to the owner is estimated at \$4552, by witnesses called to establish that fact. The jury gave a verdict for \$4517 36, and \$400 damages, the former being the sum claimed by him for his loss.

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WORKMAN
vs.
INS. COM.

The counsel for the defendants assumed in argument that the questions on which a correct decision of this cause depends, are merely legal, and must be solved by a just interpretation of the written contract entered into between the parties. In this position we agree with him, and that the intention both of the obligors and obligee must be sought for in the true meaning and spirit under which the agreement was made, as expressed in the written instrument. In proceeding to this interpretation or construction, we shall leave entirely out of view, the article of the conditions of insurance, so much relied on in favour of the appellants; first, because its provisions are not incorporated in the body of the policy; and, secondly, because a compliance with its requisitions does not seem in any other manner to have been imposed on the appellee by the insurers.

The intention both of the obligor and obligee must be sought for in the true meaning and spirit under which the agreement was made as expressed in the written instrument

In the construction of every instrument, the ordinary and legal meaning of words must be taken into consideration. In the present case we must inquire what the parties to the contract meant by the word *house*. In the common and ordinary acceptance, every thing appurtenant and accessory to a main building would be embraced by this word: *e. g.* if the plaintiff had made sale of his property in Dorsier-street, and told an acquaintance that he had sold his two houses there situated, the understanding would be that he had sold the main buildings, together with all others on the

In the construction of every instrument the ordinary and legal meaning of words must be taken into consideration.

The common and ordinary acceptance of the word *house*, embraces every appurtenant and accessory to the main

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INS. COM

building. So in
gal acceptance,
the sale of a house
carries along with
it whatever may
be necessary to a
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enjoyment of the
thing sold.

Where a house
is insured the
back buildings will
be considered as
accessary of the
main building and
embraced by the
policy.

lot. So in a legal acceptance, a sale of a house carries along with it whatever may be necessary to a full and complete enjoyment of the thing sold.—See 3 *Bacon Ab.* p. 396.

We have no doubt of the intention of the insured, in the present instance, to secure an indemnity by the contract of insurance, 'on all and every part of his buildings on the lot in the street where they are described as situated; this evidently appears from the payment (annually) of a premium commensurate with the entire value of the whole: and as the insurers seem to have waived a compliance with the conditions required by their first article on the subject of description and valuation, it is just to presume that they took on themselves the risk of loss by fire, of the entire property intended to be insured, in the whole and in all its parts. The back buildings being of inferior value, and capable of access only through those on the front, may fairly be considered as accessaries to the latter, and embraced by the policy. A different conclusion would, probably, be correct where the valuation, and consequent premium on front buildings, should be shewn to be wholly inadequate to the real value of store-houses in the rear of a lot. According to our best consideration, given to this case, both in weighing the evidence and consulting the law applicable to the subject, we are of opinion that the plaintiff ought to be indemnified for the loss of which he complains. But it must be confessed that we have arrived at this conclusion not without doubts. If we have doubted, well may the insurers have done so, in regard to their responsibility under their contract; being interested to view it in the most favorable light for themselves; and, consequently, the present is believed not to be a case in which damages should be assessed against them on account of the inexecution of their contract.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be avoided, reversed, and annulled. And it is further ordered, adjudged, and decreed, that the plaintiff and appellee do recover from the defend-

ant and appellants, the sum of four thousand five hundred and seventeen dollars and thirty-six cents, with costs in the court below; those of the appeal to be borne by him.

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June 1881

WORKMAN
vs.
INS. CO. OF

MILLAUDON vs. LAPICE.

The supreme court, whilst sitting in the eastern district, during the term prescribed by the constitution, will not transact business arising in the western.

This was a rule on the judge of the sixth judicial district, presiding at the seventh, to shew cause why a mandamus should not issue to him to grant an appeal from a judgment, rendered by him, overruling certain exceptions to an attachment sued out in the parish of Concordia, by L. Millaudon vs. P. M. Lapice.

In answer to the rule, the judge replied that the judgment was not final—but interlocutory, and no appeal would lie from such.

Martin, J. delivered the opinion of the court.

A rule to shew cause, why a mandamus should not issue to the judge of the sixth district, commanding him to allow him an appeal from a judgment lately rendered by him, in the district court for the parish of Concordia, in the seventh district. He has shewn cause. But the party in whose favor was rendered the judgment, from which an appeal is prayed, has contended that we are without authority, while sitting in one district, to act on any business of the other.

We are directed by the constitution, to sit in New Orleans during the months of November, December, January, February, March, April, May, June and July, for the eastern district; and during the rest of the year for the western district.

It is now asked of us to transact business for the western

The supreme court
whilst sitting in
the eastern district

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June 1881.

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vs.
LAFICE.

during the term
prescribed by the
constitution, will
not transact business arising in the
western.

district at New Orleans, in the month of June, i. e. at a place and time, quite different from those that have been provided for by the constitution.

It is urged the district judge has shewn cause, and thereby waived any objection on his part, and therefore we can act. Admitting what is extremely doubtful, that the consent of parties would authorize us to act, that of the party in possession of the judgment, is wanting.

It is therefore ordered, that the rule be discharged at the costs of the applicant.

BAUDIN vs. CONWAY ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT.
THE JUDGE OF THE DISTRICT PRESIDING.

In a case involving accounts of forty years standing, the verdict of a jury has less weight than in other cases; because it requires operations not easily performed in a court or jury room.

The executor cannot prove that a receipt of the plaintiff for payment made by the deceased, as attorney for the defendants, embraced a larger sum than was actually paid—this would be proving a negative. Nor can he support his testimony by an account between the plaintiff and the deceased for the defendants are no party to it.

Interest cannot be allowed on a judgment given for the balance of an account between the parties, where payments have been made for costs, and on other accounts.

This suit has been of long standing, and embraces a variety of money transactions, which cannot be explained in detail; nor would it afford any useful information to do so. All the facts necessary to a full understanding of the case, are stated in the opinion of the court.

Moreau Laslet, for the plaintiff and appellant.

Martin, J. delivered the opinion of the court.

The heirs sued for a balance due by their ancestor, who was surety of Pollock, the plaintiff's original debtor; contended their ancestor had paid more than he owed, and set up

demand in reconvention. They had judgment, and the plaintiff appealed.

The case was tried by a jury, who had to examine transactions of about forty years standing. In a case like this, their conclusions have less weight than in others, because it requires operations not easily performed in the court, or in the jury room.

It has appeared to us, the plaintiff has clearly shewn his claim, by a judgment against Pollock, made executory against the surety, for twenty thousand one hundred and eighteen dollars twenty-two cents; and for costs against the principal and surety, two thousand one hundred and thirteen dollars eighty-seven and a half cents, being twenty-two thousand two hundred and thirty-two dollars.

The defendants have produced the plaintiff's, for fifteen thousand eight hundred and fifteen dollars.

The plaintiff's receipt to D. Clark, their attorney, one thousand eight hundred and forty dollars, sixty-two and a half cents.

They claim credits for the proceeds of a tract of land, of Pollock, sold by plaintiff's, four thousand and three dollars, and fifteen cents, being twenty-one thousand six hundred and fifty-eight dollars, seventy-seven and a half cents.

Leaving a balance due to the plaintiff, of five hundred and twenty-three dollars, twenty-three cents.

The plaintiff's counsel has attempted to reduce the credit, claimed on the receipt to Clark, by the deposition of the executor of the latter, who deposes, that the whole sum, mentioned in the receipts, was not paid—and the deposition is attempted to be supported by an account current, between Clark and the defendants, in which they are debited for a less sum; but this cannot be admitted; the executor could not prove a negative, and the account current affords no evidence against the plaintiff, who was not a party thereto.

The plaintiff has claimed interest on his judgment, and disbursements for costs. This has appeared to us inadmissible

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Interest cannot be allowed in a judgment given for the balance of an account between the parties, where payments have been made for costs, and on other accounts.

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June 1881.

WAUDIN
vs
CONWAY ET AL.

In the case of *Saundres vs. Taylor*, 7 *Matrin*, N. S. 14., we reversed a judgment of the parish court, which allowed interest on a judgment—no law existing for such an allowance.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be annulled, avoided, and reversed, and that there be judgment for the plaintiff for the sum of five hundred and seventy-three dollars and twenty-three cents, with costs in both courts.

GASQUET & CO. vs. JOHNSTON—BREWSTERS' INTERVENING.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where A obtains a letter of credit, but before it is presented, the persons who gave it, losing confidence in A, direct him not to use it, but he afterwards presents and uses it, contrary to directions, by purchasing goods on the faith of it from B., such use is a fraud practiced on B, which authorizes him to claim the goods, in preference to an attaching creditor of A.

A fraudulent purchaser, who obtains property by a fraudulent representation, acquires only the naked possession, which gives no right to any of his creditors to attach it in his hands.

The plaintiffs sued out a writ of attachment against the property of the defendant, a nonresident, and obtained judgment. The interveners opposed the sale of a quantity of hats, which had been attached, and which were sold by them to the defendant. In their petition they charge, that the defendant represented himself as authorized to draw on the house of Fisher, Burke & Watson, which representation they alleged was false and fraudulent. Their petition concluded with a prayer for a rescission of the sale to Johnson, on the ground of fraud, and for restitution of the property.

It appeared from the evidence that the defendant had obtained from Fisher, Burke & Watson, a letter of credit, which he was afterwards verbally requested by them to return. To this request he made no objection, but could not,

at the moment, lay his hands on the letter; he assured them, however, that the letter should not be used. Nevertheless, it was afterwards exhibited by him in New-York, and on the faith of it he purchased the goods from the interveners.

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GASQUET ET AL
VS.
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There was judgment for the plaintiffs in the court below, and the interveners appealed.

Strawbridge for appellant.

M' Caleb and *Slidell* for appellee.

Martin, J. delivered the opinion of the court.

Brewster et al. intervened, in this case, to claim a quantity of hats, part of the property attached, sold by them to the defendant, on the ground of fraud used by the latter in obtaining them. Their claim was disallowed, and they appealed.

The facts of the case are these:—Johnson, who had obtained from Fisher, Burke & Watson, of this city, a letter of credit for the appellant at New-York, lost by some means the confidence of these friends of his, and they requested him not to make use of the letter, but return it. To this he assented; but found his way to New-York, where, on producing the letter, he obtained the hats, and gave the appellants a bill on Fisher, Burke & Watson, who soon after failed.

The appellant's counsel has urged that these facts establish a fraud in Johnson, which, were the hats still in his possession, would authorize them to claim them back; and that the attachment by his creditors does not affect his claim.

The appellee's counsel has urged that the sale was fair and bona fide, not only so far as the interests of third persons were concerned, but in regard also to those and the expectations of the appellants, who gave credit to the defendant on the faith of a letter of credit, which bound the writers, who could not exonerate themselves from their responsibility by alleging a revocation of the credit, whilst they suffered the defendant to retain the letter;—that if the appellee's sold on

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the guarantee of Fisher, Burke & Watson, no fraud was practised on them; for they fully acquired it. If, on the contrary, they trusted the defendants, and were satisfied to look to him, the length of credit they gave is evidence of their want of intention to retain any lien on the goods, as the credit was given to enable the vendee to raise money to pay for the goods by the sale of them: and this court has decided that when the party can sell, the creditors may attach.—*Olivin vs. Towles*, 2 *Martin*, 93; *Dunford vs. Brooke's syndics*, 3 *Martin*, 327; *Norris vs. Mumford*, 4 *id.* 20; *Ramsay vs. Stephenson*, 5 *id.* 23.

The counsel for the appellants has relied on the cases of *Buffington et al. vs. Gaush et al.* 15 *Mass. Rep.* *Cony vs. Irwin et al.* 2 *Mason*, 239. *Dewolf vs. Butler*, 4 *Mason*, 289; and *Allison vs. Mathews*, 3 *Johnson*, 235,—in support of his allegation of fraud.

He has urged that in the cases relied on from *Martin*, this court said, that where the debtor can sell, his creditors can attach: but the decision of that case must be confined to those similarly circumstanced; i. e. when the opposing creditor has an imperfect title, (the possession yet remaining in the vender,) the attaching creditor will hold the property; the sale, as to third persons, being completed by the delivery alone: and he has referred us to the case of *Torregana Segura's syndics*, 2 *Martin*, *N.S.* 158; in which we held that after the insolvent had transferred to his creditors a slave, the price of which he had not paid, his endorser becoming subrogated, by paying it, to the rights of the vender, could demand a rescision of the sale, and recover the slave. He has cited, finally, the case of *Armour vs. Cockburn*, 4 *Martin*, *N. S.* 666; in which we held that if the consignee promises to sell the goods and pay the proceeds to a creditor of the consignor, (the promise being accepted by the creditor) the goods cannot be attached to his prejudice by any other creditor.—*Civ. Code*, 2010 and 3109. *Code of Practice*, 23.

Where A obtains a letter of credit, but before it is presented, the persons who gave it,


The exhibition of the letter of credit, under the circum-

stances of this case, was clearly a fraud, practised by the defendant on the appellants; for it induced them to believe that they had, besides the responsibility of the writers, that of a person whom the latter considered as trust-worthy, and he falsely represented himself to them as such, by the production of a false token. In a moral point of view, the use of the letter after it was revoked, was equally as criminal as the forgery of a similar one.

A letter of credit virtually includes a recommendation;—for the best manner that a solvent individual has to recommend his friend, is by offering to guaranty his performance of his contracts. Such a letter often enables the bearer to obtain credit from the person to whom it is addressed, beyond the limits which the writer may have put to his own liability; and it often secures the confidence of other persons, who may see or hear of it.

In the case cited from 2 Mason, Judge Story raised the question, whether when possession is obtained by fraud, on a sale of goods, the contract be void *ab origine*. He solved it in the affirmative in the case in 4 Mason. G. D'Wolf had bought from Babett several boxes of sugar, which he was to pay for by certain acceptances. Before the delivery of these acceptances, and whilst the sugar was still in the vender's store, the vendee made a contract for the shipment of the sugar, and obtained the signature of the master of the ship to bills of lading for the sugar; and J. D'Wolf, to whom he transferred the bills of lading, and whom he furnished with the invoices, on faith thereof made him a considerable advance. The persons whose acceptance the vender had stipulated for, having failed; and the vendee concealing the failure, obtained his consent to the sugar being sent on board. On discovering the vendee's inability to comply with the terms of the sale, the vender successfully resisted the claim of the assignee of the bill of lading; Judge Story being of opinion that the delivery, on the part of the vender, was a

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losing confidence in A, direct him not to use it, but he afterwards presents and uses it, contrary to directions, by purchasing goods on the faith of it from B, which authorizes him to claim the goods, in preference to an attaching creditor of A

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JOHNSON

conditional one, depending on the compliance with the terms of the sale, and obtained by the concealment of the failure, and, consequently, could not divest the vender of his property.

The decision of this court, that where the debtor may sell, the creditor may attach, must be understood as confined to cases in which the debtor had once the property of the goods, and still retains it as to his creditors, although he may have lost it as to his vendee, as in the case of a sale not followed by delivery. There may be cases, as those in the 3473d article of our Civil Code, in which the sale of a third person's thing, may transfer a property which the vender has not, either in an absolute or qualified manner. In such a case we think, with the claimant's counsel, that although the party could sell, his creditors could not attach.

A fraudulent purchaser, who obtains property by a fraudulent representation, acquires only the naked possession, which gives no right to any of his creditors to attach it in his hands.

In the present case, although the defendants had the possession of the claimant's goods, it is clear the property of the latter was not divested by his parting with them on a fraudulent representation. They might successfully have claimed them from the defendant, who had only a naked possession, which gave no right to his creditors to attach.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and that there be judgment for the intervening party, or claimants, with costs in both courts.

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HARTY ET AL. vs HARTY ET AL.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW ORLEANS.

The minor who attempts to recover from his tutor, the price of an immoveable, which the latter has sold, cannot, in case he fails to obtain the whole price, sue the purchaser for the object in his possession.

Where the tutrix acquires property of the minor contrary to law, she is a possessor in bad faith, and responsible for the rents and profits.

Revenue due from the time of emancipation, is due from the time the minors are emancipated by marriage: but binding one of them as an apprentice does not emancipate him.

When minors come of age they may confirm irregular alienations of their property, and demand the price, or they may disavow them, and claim the thing and its fruits, but they cannot do both.

Eastern District,
June 1831.

Minors cannot claim interest on the value of property which remains unsold, or which they state was sold illegally.

HARTY ET AL-
vs.
HARTY ET AL

An action for interest cannot be maintained apart from the principal.

Every settlement between the tutor and the minor arrived at the age of majority, is void, which is not preceded by an account, and delivery of vouchers, ten days before the receipt is signed; and these facts must appear by the receipt.

The facts are fully stated in the opinion of the court delivered by

Porter, J.

The plaintiffs bring this action against Harty, their mother and tutrix, for an account and settlement of their estate administered by her, and against Sinnot, her second husband, for having possession of the property left them by their deceased father.

Sinnot pleaded specially that he was not the husband of the tutrix—a general denial—and claimed, in reconvention, the sum of six thousand dollars, which he averred the widow and heirs owed to him.

The tutrix pleaded, that she had rendered an account to her minor children in 1816; and at that time a partition was made between them; and that she has no further account to render, except in relation to the proceeds of a house and lot which had been set apart to her in the partition, and her title to which had been since annulled by proceedings at law.—*See 8 Martin, N. S.* To this answer she annexed the account filed by her in 1816.

To this account the plaintiffs presented an opposition, on the following grounds:

That a large proportion of the property inventoried at the death of their father, as community property, and so considered in the account filed, was, in fact, brought by the father into marriage, and belonged to him exclusively:

Eastern District.
June 1881.

MARTY ET AL.

vs

MARTY ET AL.

That she is responsible for the rents and profits of the house and lot in Chartres-street, which was decreed by the court to have been improperly adjudicated to her, from the year 1813 up to the time of filing the opposition; and that they are also entitled to the rents and profits of three tracts of land, sold by their mother, at Bayou Sarah, for which they intend to bring suit against the third possessors:

And that they are also entitled to the hire of three slaves, for which they do not intend to bring suit, as they are either dead or greatly diminished in value.

To this opposition a detailed account of various charges, made by the heirs against their mother, was annexed. The court of probates rendered judgment, sustaining the opposition in some parts, and overruling it in others. From this judgment Sinnott appealed.

It has been agreed by the counsel that there is no difficulty between them as to the property which is alleged to be community on one hand, and claimed to be that of one of the spouses on the other; and that our decision is required alone on the legal questions which have been discussed at the bar.

The first of these is in relation to the claim of one of the heirs, Artemise, to a proportion of the proceeds of the house and lot, originally adjudicated to the mother, but which adjudication has been since annulled at the suit of the plaintiffs.

After her marriage her husband received from her mother, who was tutrix, his wife's share of her father's estate. The amount due to her was settled on the basis of the account rendered in 1816; and in that account the mother was debited, and the heirs were credited with the price at which the house and lot in question had been adjudged to the mother. Some time after the husband failed, and his wife presented herself as a creditor, and claimed from his estate the amount which he had received on her account from her mother. In this amount, we have already seen, was included her share of the price of the house and lot to which she now sets up demand.

We think that this was clearly such a ratification, on her part, of the adjudication to her mother, as covered (so far as she was concerned) all informalities in the mode in which it had been alienated; and that she is precluded from demanding the thing, after having attempted to obtain the price. Her counsel have insisted that as she was unable to obtain from her husband's estate the whole amount received by him, the ratification must be limited to the sum recovered. But this argument appears to us to rest on an entirely erroneous view of the principles on which effect is given to the approbation evinced by minors, after they arrive at the age of majority, of the acts of their tutors in relation to sales of their property. They have the power to affirm or disavow the contract at their pleasure; and they may make their affirmance depend on the condition of being paid, or any other condition they please. But if they do an act shewing their approbation, and evincing their intention to carry that contract into effect without any reservation on their part, they cannot afterwards at their pleasure annul it, on the ground that the course they adopted was not profitable or useful to them. They are subject to the rules which govern all other principals, who assent to acts of their agents.

The house and lot which was adjudged to the mother was restored by a decision of this court to the succession. The minors claim their share in the rents of that house from the time it came into the hands of the tutrix up to the sale of it, under the recent decision of this tribunal; and this claim, we think well founded. The minors property was acquired by the tutrix under proceedings provoked by her. These proceedings were not conformable to law. She was in consequence of this informality, technically a possessor in bad faith, and must account for the fruits or rents from the time the property came into her possession under the adjudication. They are also entitled to an account of the rents during the time their mother held the house and lot as their tutrix previous to the adjudication: that is, from the month of October, 1813

Eastern District,
June 1831.

HARTY ET AL
vs.
HARTY ET AL

The minor who attempts to recover from his tutor the price of an immoveable, which the latter has sold, cannot, in case he fails to obtain the whole of the price, sue the purchaser for the object in his possession.

Where the tutrix acquires property of the minor, contrary to law, she is a possessor in bad faith, and responsible for the rents and profits.

CASES IN THE SUPREME COURT

Eastern District,
June 1881.

HARTY ET AL
vs.
HARTY ET AL

Revenue due from the time of emancipation, is due from the time the minors are emancipated by marriage. But binding one of them as an apprentice does not emancipate him.

But this inquiry appears only to be of importance in settling the question, whether the rents are due from the time of the emancipation of the minors, or from the inception of the suit to annul the sale; for by an entry on record, we perceive the parties have agreed, "that the boarding, lodging, and education of the plaintiffs, by their mother, during their minority, and up to the time of their emancipation, or majority, was equal to the full revenue of their respective estates, and the interest thereon." The parish court gave the rents from the time the female heirs were emancipated by marriage, and in this we think decided correctly. It also decided that the rents should be paid to the male heir from the time he became an apprentice; but in this part of the judgment we cannot concur. The agreement on record controls the right to claim until after emancipation, or majority. Binding a child to learn a trade does not emancipate him, and the evidence shews the plaintiff did not reach the age of majority, until a considerable time after his apprenticeship commenced.

There is a claim set up for the hire of three slaves which were adjudged to the mother; the plaintiff's at the same time stating expressly that they will not claim the property, because it has diminished in value.

When minors come of age, they may confirm irregular alienations of their property and demand the price, or they may disavow them and claim the thing and its fruits, but they cannot do both.

When minors come of age they may confirm irregular alienations of their property and demand the price, or they may disavow them and claim the thing and its fruits. But they cannot do both; and yet that is what they do here. They are willing to accept the price at which the property is sold, and demand the fruits or hire, as if it had remained unsold. This cannot be done. If they decline to annul the sale it stands as a legal one. Their right is in the proceeds of the property, and not to the property; and they may demand the interest on the amount produced by the sale, together with the principal, but nothing more.

They next demand the interest on the price of property

adjudged to their mother, which they state has been sold to third persons, and for which they declare they intend to bring suit, as the adjudication to their tutrix was illegal and void. This claim presents as great an inconsistency as that just disposed of. In regard to the slaves, they claimed the price at which they were sold, and their hire, as if they had remained unsold. Here they demand the thing as unsold, and ask for the interest on the money as if it had been sold; and this, in our judgment, they have no right to do. It is for them to decide, whether the increased value of the property will compensate them for the money for which it was sold, and the interest thereon, in case it is of a description which did not produce fruits. If it did on the contrary produce them, they should ask an account of these fruits. Besides, an action for interest cannot be maintained apart from the principal, and that the plaintiffs state they will not receive.

Another question was submitted for our decision. It is contended that the plaintiff, Artemise, by claiming from her husband's estate the amount received by him from her mother, not only affirmed the alineation of the lot, but also waived all errors which might be in that account, and is now precluded from taking advantage of them. To this position we cannot assent. The receipt of the money from the husband, cannot have a greater effect than the receipt from the tutrix herself would have had: and, that would not have been a bar, because every settlement between the tutor and the minors arrived at the age of majority is void, which is not preceded by an account and delivery of vouchers, ten days before the receipt is signed; and these facts must appear by the receipt.—*Civil Code 72, art. 76.*

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be avoided, reversed, and annulled, and that this cause be remanded, with directions to give judgment agreeably to the principles laid down in the foregoing opinion; the costs to be paid out of the funds deposited in the said court.

Eastern District,
June 1881.

MARTY ET AL
vs.
HARTY ET AL

Minors cannot claim interest on the value of property which remains unsold, or which they state was sold illegally.

An action for interest cannot be maintained apart from the principal.

Every settlement between the tutor and the minor, arrived at the age of majority, is void, which is not preceded by an account and delivery of vouchers, ten days before the receipt is signed, and these facts must appear by the receipt.

Eastern District,
June 1831.

HARTY ET AL. vs. HARTY ET AL.

HARTY ET AL.

vs.

HARTY ET AL.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF
NEW-ORLEANS.

If minors property has been sold contrary to law, their mortgage on it will take precedence of the liens which the purchasers may have subjected it to in their hands.

The facts are stated in the opinion of the court delivered by

Porter, J.

The house and lot, which had been adjudicated to the mother of the petitioners, was by a judgment of this court, declared to still belong to the heirs of Simon Harty, the alienation having been made contrary to law, and void. See 8 N. S. 508.

While in possession of the mother, and in that of one of her sons, to whom she conveyed, mortgages were given to several persons, and to the Bank of Louisiana.

The court ordered there mortgages to be erased, and directed the proceeds to be brought into court for distribution.

The plaintiffs claim their share in the proceeds of the sale, as heirs of Simon Harty; and they also assert, that they have a mortgage on the balance of the proceeds, for any moneys which may be due to them by their mother, on the general account rendered by her as tutrix.

This pretension is well founded, in relation to all the plaintiffs, for the general mortgage, which the law grants them on the property administered by their tutrix:—and it is equally correct, as to the demand of two of them, for their share of the proceeds of the house and lot, as part owners thereof. But in regard to one of them, Artemise, she having confirmed the alienation made by her mother, cannot now demand any portion of the proceeds. Her right has been examined at length in the case just decided.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates, of the city and parish of New Orleans, be annulled, avoided and reversed, and it is further ordered, that out of the net proceeds of the sale of the lot

The universal legatee, who after taking possession of the estate, and paying the debts of it, is credited by two thirds of the succession, only loses one third of the debts due to him, or by him paid. The confusion which existed while he represented the whole estate, ceases with the eviction of a part of it.

and buildings belonging to the estate of the late Simon Harty, amounting to the sum of twelve thousand five hundred and forty-three dollars, fifty-three cents, Philip Harty and Adele Harty, wife of Isaac Lambert, be paid by privilege and preference to any other creditors, each the sum of one thousand eight hundred and eighty-one dollars, fifty-three cents; making for both, a sum of three thousand seven hundred and sixty-three dollars, sixty cents, for their respective shares in the said sum, as the lawful heirs of the said Simon Harty, their father, and that the balance of the said net proceeds, amounting to a sum of eight thousand seven hundred and eighty dollars and forty seven cents, as accruing to the widow Harty, shall remain subject to the further order of the court below, as affected to the tacit mortgage which the plaintiffs had on the property of the said widow Harty, until the balance of the account be rendered to them by the said widow Harty, as having been their guardian, be finally settled. Costs to be paid out of the money deposited in the court below.

Eastern District,
June 1881

WARTY ET AL.
vs.
HARTY ET AL

HODDER ET AL. vs. NELDER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The universal legatee, who after taking possession of the estate, and paying the debts of it, is credited by two thirds of the succession, only loses one third of the debts due to him, or by him paid. The confusion which existed while he represented the whole estate, ceases with the eviction of a part of it.

In the year 1814, and for some years before, the defendant owned jointly with his uncle, Edward Pearse, a plantation and slaves in the parish of Plaquemines; the share of the defendant being considerably greater than that of his uncle, who was indebted to the former for advances to nearly, or quite, the amount of his interest in said property. In August, 1814, Edward Pearse died, leaving the defendant his universal legatee, who accepted the succession without the benefit

Eastern District,
June 1881.

MODDER ET AL
vs.
NELDER,

of an inventory, and subsequently sold it. At the time of the death of Edward Pearse his mother existed in England, and the present suit was brought by her legal representatives, to reduce the legacy to the disposable quantum.

There was judgment for the plaintiffs for \$633 38, being one-third of the succession; from which the defendant appealed.

Livermore and Grymes for appellant.

Hennen for appellees.

Mathews, J. delivered the opinion of the court.

This suit is brought to recover from the defendant the succession of one Edward Pearse, deceased. The plaintiffs obtained judgment in the court below for \$633 38, estimated as one-thirteenth part of said succession; from which the defendant appealed.

The case has been carelessly argued before this court, and we are consequently left to infer from the record, and points filed, (which are by no means explicit) the matters really in dispute between the parties; the principal of which, we believe, relates to the claims set up by the defendant against the estate of Pearse. To arrive at any just conclusion on this subject, it is necessary to state some of the leading facts.

Previous to the year 1814, Pearse & Nelder were joint owners of a plantation and slaves, situated in the parish of Plaquemines. Some time in that year Pearse died, after having made a will, by which he appointed his partner, Nelder, one of his executors, and constituted him his universal legatee—who under this title took possession of the estate, paid its debts, and enjoyed the advantages resulting from it uninterruptedly until 1828, when suit for its recovery was commenced. The amount of Pearse's succession, according to an estimate of its value at the time of his death, is twelve thousand and four hundred dollars. As he left a mother living at that period, he could only legally dispose in

favor of his legatee one third of his estate, say 4100 dollars, leaving a balance of \$8234, to be divided amongst the representatives of his mother and forced heir, who died in 1816. Pearse at his decease owed to Nelder \$5,268 50; and afterwards the latter, in his capacity of executor and legatee, paid on account of the succession \$4,989 43, making an aggregate of \$10,217 99. This amount he claims as a credit against the *legitime* about to be recovered by the heirs of Pearse's mother. The whole dispute now remaining to be settled between the parties, relates to the legality of this credit.

Eastern District,
June 1831

HODDER ET AL
vs.
NELDER

The defendant assumed the character of universal legatee, without the benefit of an inventory, and, consequently, made himself personally responsible for the debts of Pearse's estate, which it appears he afterwards paid, as we have already seen, to the amount of \$4,949 43. This sum, together with what the testator owed to him, places him on the footing of a creditor of the succession for \$10,217 93. Now if the legatee had been permitted to enjoy, as owner under Pearse's will, the whole of the estate of the latter, the confusion of situations as creditor and debtor would still exist, as contended for by the counsel for the plaintiff. But the recovery of two-thirds in favour of the representatives of the mother of the donor, certainly leaves an incumbrance of two-thirds of the debts of the succession, on the portion by them recovered. In other words, Nelder no longer holds the double character of creditor and debtor, in relation to those parts of Pearse's estate. We think the court below erred, in its conclusions on the rules of law relative to confusion, in their application to the present case. As the defendant's title to one-third of the whole succession is maintained, he should lose in this proportion the benefit of the amount due to him as creditor thereof, according to the doctrine of confusion established by law; for as to this part, he remains precisely in the situation he would be, in relation to the whole, had he not been disturbed by the pre-

The universal legatee, who after taking possession of the estate, and paying the debts of it, is credited by two thirds of the succession, only loses one third of the debts due to him, or by him paid. The confusion which existed while he represented the whole estate, ceases with the eviction of a part of it.

Eastern District,
June 1881.

WEDDER ET AL
vs.
WILDER

sent action. The entire succession owes to him \$10,217 98; take from this sum one-third, and the balance is \$6811 95, and this last sum deducted from \$8234, the *legitime* of Mrs. Pearce, leaves \$1422 05, to be divided amongst her representatives, in number thirteen, as assumed by the judge *a quo*. The result of this calculation is, that the plaintiff should recover \$101 78.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be avoided, reversed, and annulled. And it is further ordered, adjudged, and decreed that the plaintiff and appellee do recover from the defendant and appellant, the sum of one hundred and one dollars and seventy-eight cents, with costs in the court below; the appellee to pay those of this court.

PELLETIER vs. ROUMAGE.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.

One who exceeds the limits of his mandate has no claim for indemnification.

This was an action upon an account current, in which there was an item of three thousand and nine hundred dollars, as an advance to the defendant's brother in New York, by authority of defendant's letter of credit of 18th July, 1826, directing the plaintiff to open a credit to his brother, F. Ramage, for five thousand dollars, to be drawn as might be wanted. The defendant pleaded the general issue, and reconvened for \$161 67. It was in evidence that when the plaintiff had advanced \$1,100 and drawn for it, a new arrangement was entered into between himself and F. Ramage, that further advances should be made him, and in the event of his being unable himself to meet them at fixed periods, they should be charged to his brother, on account of the letter of credit. The defendant subsequently wrote to the plaintiff to take no more of his brother's drafts on him.

Plaintiff then debited him with advances to his brother, making in all \$5000, and drew on him for it. The bill was dishonored and to recover its amount this suit was brought. There was judgment for the defendant, and the defendant appealed.

Eastern District,
June 1831.

PHILIPPA
vs.
ROUMAGE

Martin, J. delivered the opinion of the court.

The plaintiff claims a balance of \$3,760 69, according to an account current annexed to the petition. The defendant denied the debt, and claimed in reconvention, a sum of \$161 67, according to an account current annexed to his answer.

The defendant had judgment both on the original demand and that in reconvention, and the plaintiff appealed.

It appears that in July, 1826, the plaintiff was directed to open to the defendant's brother, a credit of \$5000, to be advanced as his affairs might require, in the city of New York; and the plaintiff was directed, in case he had no funds of the defendant in his hands at the time of such advance, to draw on the defendant in New Orleans. Shortly after this, the plaintiff made an advance for \$1,100, for which he drew.

An arrangement afterwards was entered into by the plaintiff and the defendant's brother, by which the former agreed to make very considerable advances to the latter, to enable him to carry on an extensive rope establishment in New Jersey. By this arrangement the plaintiff secured large profits by interests and commissions. He stipulated that on the defendant's brother failing to make payment at certain periods, the deficiency should be carried to his debit, as an advance on the credit which his brother had given him on the plaintiff. The business of the rope-walk was, by this means, considerably extended; and shipments of ropes were made to the defendant, for sale in New Orleans; on each of which his brother drew on him, in favor of the plaintiff, for the probable amount of the sales. These operations in New Orleans became unprofitable, and

Eastern District,
June 1881.


PELLETIER
vs
BOUMAON

the defendant reshipped to his brother, the unsold stock of ropes, and directed the plaintiff to forbear taking the brother's drafts. At last, in the year 1829, the defendant's brother being unable to reimburse the portion of the plaintiff's advances which had become payable, the plaintiff credited him with a sum of \$3,900, the balance of that of \$5000, for which the defendant had given him credit, and immediately drew on the defendant therefor. Payment was refused, and the present suit was instituted to test the correctness of the claim of the plaintiff on the defendant for the reimbursement of that sum.

The parish judge has considered the return of the unsold stock of ropes, of which the plaintiff was advised, and the prohibition of his receiving drafts on the defendant from his brother, as an implied recall of the credit opened in 1826.

In his opinion, on this point, we are unable to concur. The shipments to New Orleans having become unprofitable, the determination of the defendant to put an end to them, afford no presumption that he intended to put an end to the aid he had granted his brother; and the directions he gave to the plaintiff not to receive his brother's drafts, was, perhaps, dictated by a wish that the credit he had given him on the plaintiff should be the extent of the assistance he afforded him.

One who exceeds the limits of his mandate, has no claim for indemnification.

But it has appeared to us that the plaintiff went beyond the boundaries of his mandate. The defendant intended to afford his brother, by the help of moderate and timely cash advances, the facility of carrying on a business commensurate with his means and facilitated by this aid. It does not appear that he intended that the plaintiff by advances of cash to three times the amount contemplated, should decoy his brother into an extension of business, rendered burthensome by the interests and high commissions which his business did not warrant—nor that the plaintiff should consider here the defendant ultimately liable for the credits still open, after he the plaintiff had swept from his brother whatever could be

obtained for advances made without the defendant's knowledge or consent, and on terms very different than those the credit proposed was intended.

On this ground we think the judgment ought not to be disturbed.

It is therefore ordered, adjudged and decreed, that it be affirmed with costs in both courts.

Eastern District,
July 1831.

PELLETIER
vs.
ROUMAGE

CROCKER vs. BLANC.

APPEAL FROM THE COURT OF THE PARISH AND CITY
OF NEW-ORLEANS.

Walls erected by a proprietor on his property which still leave a space between them and his neighbors, cannot be considered as surrounding the premises. They are not division walls, and it is only these which authorizes one coproprietor to refuse permission to another to raise a separation between them on the land of both.

The defendant, who owned a lot adjoining the plaintiff's, proceeded to erect a wall on the dividing line, placing six inches of it on the plaintiff's lot.

The plaintiff prayed that the defendant be decreed to demolish the wall; that he pay \$600 damages, and be enjoined from further proceedings, &c. The evidence shewed that the lot of the plaintiff was first built upon, but that an open space remained between his building and the dividing line. There was a verdict, and judgment for the defendant, and the plaintiff appealed.

Moreau and Soule for appellant.

Waggaman for appellee.

Porter, J. delivered the opinion of the court.

The plaintiff and defendant are contiguous proprietors of lots situated in this city. The defendant commenced building a wall on the dividing line between them, and placed six inches of it on the property of the plaintiff. The latter, considering this an encroachment on his rights, applied for, and

Eastern District,
July 1881.

CROCKER
vs.
BLANC

obtained, an injunction to prevent any further progress in the work. In the petition asking for this writ, he also prayed that compensation might be made to him for the damages he had sustained by the illegal act of the defendant.

The answer put at issue the allegations in the petition; and the defendant further demanded \$500 in reconvention, the amount of the injury alleged to be sustained by the illegal interruption of the work.

The cause was tried by a jury in the court below, who found a verdict for the defendant. The court sustained it, notwithstanding an attempt on the part of the plaintiff to obtain a new trial. He appealed.

The 671st article of the Louisiana Code, by providing that he who first builds in a place not surrounded by walls, may rest one-half of his wall on the land of his neighbour, reduces our inquiry in this case to matters of fact.

The evidence shews that the plaintiff has built first, and that the place was not surrounded by a wall. The plaintiff, indeed, proved that anterior to the time the defendant commenced this work, a wall had been built on the lot of the former, a few feet from the dividing line. But the walls erected by a proprietor on his property, which still leave a space between them and his neighbours, cannot be considered as surrounding the premises;—they are not division walls, and it is only these which authorize one coproprietor to refuse permission to another, to raise a separation between them on the land of both.

We have been asked to give damages on the demand in reconvention. The jury would not give any; and the defendant not only acquiesced in the verdict, but resisted the plaintiff's prayer for a new trial. The evidence does not present a case sufficiently strong to enable us, under such circumstances, to disturb the judgment below.

It is therefore ordered, adjudged, and decreed, that the judgment of the Parish Court be affirmed, with costs.

Walls erected by a proprietor on his property which still have a space between them and his neighbors, cannot be considered as surrounding the premises. They are not division walls and it is only these which authorize one coproprietor to refuse permission to another to raise a separation between them on the land of both.

ZENO vs. LOUISIANA INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The decree of a foreign court of admiralty is *res judicata* in regard to the matters decided therein.

Eastern District,
July 1831.


ZENO
vs.
L.A. INS. CO.

This action was brought to recover of the defendants the value of the schooner Constitution and her cargo, insured by them hence to Vera Cruz, with a warranty by the assured, that the cargo and vessel were American, and that the latter should not force the blockade. The defendants pleaded non-compliance with the warranty.

It appeared that on entering the harbor of Vera Cruz, the vessel was seized, libelled and condemned, for wanting the documents necessary to establish her neutral character, and the goods, because they were about to be introduced in violation of the blockade. The defendants offered the record of the condemnation by the admiralty court of Mexico as *res judicata* on the infraction of the warranty. There was judgment for defendants, and the plaintiff appealed.

Dennis for appellant,

Grymes for appellee.

Martin, J. delivered the opinion of the court.

This case was remanded from this court at May term, 1827.—6 *Martin, N. S.* 62.

To establish a breach of the clause of warranty, the defendants relied on a sentence of condemnation in the court of admiralty; but the plaintiff shewed that the sentence had not passed in *rem judicatam*, and had been appealed from.

The district court gave judgment for the defendants, and the plaintiff appealed.

In this court the plaintiff's counsel has urged, that the document relied on by the defendants does not establish *rem judicatam*; that it ought not to have been received, being but the copy of a copy; that it does not establish a breach of the clause of warranty.

The sentence of the court of admiralty, it now appears,

The decree of a
foreign court of
admiralty, is *res*

Eastern District,
July 1881.

ZENO
vs.

L.A. INS. CO

judicata in regard
to the matters de-
cided therein.

has passed *in rem adjudicatam*; the appeal having been de-
serted, and the sentence affirmed.

The document produced is a copy of the records of the
court of admiralty, which rendered the judgment, and of the
decree of the court of appeals, transmitted to that court, to
enable it to carry its judgment into execution. It makes
part of the record of the inferior court on that suit, and is its
authority for executing its own judgment.

The sentence affirmed establishes that the condemnation
took place for an act which is clear evidence of the breach
of warranty.

It is therefore ordered, adjudged, and decreed, that the
judgment of the district court be affirmed, with costs.

STATE vs. PITOT.

AN APPLICATION FOR A MANDAMUS.

The consent or approbation of the family meeting is not required to en-
able the tutor to furnish security in lieu of the general mortgage. Their duty
is confined to estimating the value of the objects presented for special mort-
gage, and until their decision no change can be made in the security of the
minor.

So long as there is a possibility of obtaining a decision from those to whom
the law has given the preference in deciding on the affairs of minors, the
court cannot entertain the question of submitting their interest to the deci-
sion of others.

At the instance of the mother and tutrix, a meeting of the
family and friends of her minor children was convoked to
deliberate on the propriety of accepting from her a special
mortgage, in lieu of the general mortgage bearing on the
whole of her property—part of the members, including the
under tutor, were of opinion that the security offered was
sufficient to secure the rights of the minors, and that the
special mortgage ought to be accepted. Others opposed it
on the ground that the property of the minor children ought
not to be sold. Application was then made to the judge of
probates to homologate the opinion of the members favora-

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ble to the mother's request—or to convoke another meeting composed of other than the relations of the minors. This the judge refused, whereupon a rule was taken on him to shew cause why a mandamus should not issue—cause being shown.

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Porter, J. delivered the opinion of the court.

The relatrix has applied for a rule on the judge of probates of the parish and city of New Orleans, to shew cause why a mandamus should not issue to compel him to comply with a petition which she had addressed to him.

That petition was referred to and makes a part of the application, and it is seen by it that on the fourth of the preceeding month a meeting of the family and friends of her minor children was called before a notary public, to enquire and determine on the demand of the petitioner, to give a special mortgage in lieu of a general mortgage, bearing on all her property, for the faithful performance of her duties as tutrix.

That at said meeting a portion of the members, together with the under tutor, were in favor of acceding to the request, but that a majority were opposed to it.

That on these persons composing this majority being called before the court, they gave such strange reasons for their dissent, that another meeting composed of the same persons was called before one of the associate judges of the city court.

That on this second meeting they persisted in their opinion, and gave for reason that the property of minor children ought not to be sold; which is totally foreign to the purpose, and shews malice.

Wherefore the court is prayed to accept the mortgage on the property offered; or in case that cannot be done, to direct that a family meeting shall be called of such intelligent, well minded, and respectable persons as may do justice to the petitioner, and her children.

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The court refused to accede to these demands. It thought, in the language of the judge, "that the grounds set forth in the process verbal of the family meeting were shockingly unfounded," but that the law did not authorize the court to grant what was asked.

The answer of the judge to the rule, states rather more in detail the reasons just quoted from him, and submits the case to this court for its decision.

The *process verbal* of the meeting has been presented to the court. Three of the majority declared that "the property of minors was a thing sacred, which could not be touched, and that if the mother wished to sell, she might do so, subject to the mortgage. The fourth declared his willingness "to accede to the demand, provided all the rest of her property remain bound." The object of the demand we have already seen, was that the remainder should not be bound.

The act of 1830, under which this proceeding was conducted, after declaring that tutors, &c., may give a special mortgage in cases like the present adds: *Provided*, that a meeting of the said minor, or minors, duly called according to law, on the petition of the said surviving father or mother, to that effect; addressed to the court of probates of the proper parish, shall declare that the property offered to be so specially mortgaged, is in the opinion of said family meeting of sufficient value, to secure the rights of said child or children in capital, and interest," &c. &c.—*Act of 1830, p. 46.*

The consent or approbation of the family meeting is not required to enable the tutor to furnish security in lieu of the general mortgage; there duty is confined to estimating the value of the objects presented for special mortgage, and until their decision no change can be made in the security of the minor.

By this enactment it appears, that the consent or approbation of the family meeting is not required to enable the tutor to furnish the security spoken of, in lieu of the general mortgage; their duty is confined to estimating the value of the objects presented for special mortgage. In the instance before us, though twice called on, instead of discharging the duty which the law devolves upon them, they refused a compliance with it on speculative ideas of their own—and consi-

dering the property of minors as a thing sacred—and consequently disliking the policy of the legislation, they concluded they could not give their consent to the change of hypothecation.

As the law did not ask their consent, but required their decision on the value of the property submitted for mortgage, it is clear that a refusal of this kind is tantamount to a declaration that they will not act on the matter submitted to them.

But until that decision, the court cannot make any change in the security of the minor—the opinion of the family meeting, as to the value of the property offered, is an indispensable prerequisite to its acceptance.

The next question is, can the court order a meeting of a family composed of other persons than the relations? The law recognizes the right to call on friends where there are no relations—in default of them, is the language of the code. Whether, after all the means which are in the power of the tribunal of the first instance, to compel the family meeting to act on the matter submitted to them, have been exhausted, and no result can be obtained, there is an authority to pass over the relations and call in friends, is a question we are not called on at present to decide. So long as there is a possibility of obtaining a decision from those to whom the law has given the preference in deciding on the affairs of minors, the court cannot entertain the question of submitting their interests to the decision of others.

Let the rule be discharged.

Eastern District,
July 1881.

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VS.
FITOT.

So long as there is probability of obtaining a decision from those to whom the law has given the preference in deciding on the affairs of minors, the court cannot entertain the question of submitting their interest to the decision of others.

BOURGEOIS vs. BOURG.

APPEAL FROM THE COURT OF THE SECOND DISTRICT,
THE JUDGE OF THE THIRD PRESIDING.

The defendant's answer to interrogatories will not avail against the testimony of two credible witnesses.

A former suit by the plaintiff against the defendant, for the same object for which this is brought, had been discontinued.

Eastern District,
July 1881.

BOURGEOIS
vs.
BOURG

In this suit, the defendant sought to avail himself of his answers to interrogatories which had been propounded to him in the first. The judge *a quo* decided that the answers could not be read in evidence, and the defendant took a bill of exceptions. There was judgment for the plaintiff in the court below, and the defendant appealed. By consent of counsel the answers of the defendant were admitted in evidence on the trial of the appeal.

Nichols, for appellant. *Wheeler*, for appellee.

Martin, J. delivered the opinion of the court.

This case is before us on a bill of exceptions taken by the defendant and appellant, to the opinion of the district court, who refused to permit him to give in evidence his answers to interrogatories put to him by the plaintiff, in a former suit between them.

By consent of the parties the case is submitted to us, and the defendant, is allowed the benefit of his answers in evidence, although they do not come up with the record, and having been used below—but the counsel on both sides have agreed that we should consider them as absolutely denying the allegations in the petition.

The defendants answer to interrogatories will not avail against the testimony of two credible witnesses.

We have done so, and it appears to us the facts are proved by two witnesses, whereby the evidence resulting from the answers to the interrogatories is done away.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

MERCER vs. ANDREWS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A donation *propter nuptias* cannot be made to the prejudice of creditors.

The facts are stated in the opinion of the court, delivered by *Mathews, J.*

In this case the petitioner states herself to be a creditor of the estate of her late husband, for a balance due to her of

\$18,000, and claims to have a tacit or legal mortgage on a plantation situated in the Parish of Plaquemines, which was sold by her husband, (subsequent to the marriage contract, on which she bases her claims,) and came by regular transfers into the possession of the defendant, who holds the same as a *bona fide* purchaser; and in his favour judgment was rendered in the court below, from which the plaintiff appealed.

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The appellant relies on the fifth article of the contract of marriage entered into between her and the deceased, Robert Sprigg, and the law applicable to contracts of this nature, for a reversal of the judgment given by the district court.

The article relied on is expressed in the following terms:

"In consideration of the natural love and affection which the said Robert Sprigg bears to the said Stella Mercer, he declares to make unto her, the said Stella Mercer, a donation *inter vivos* pure, simple, and irrevocable—which donation is hereby accepted by the said Stella Mercer—of a sum of twenty thousand dollars, in order that the said donation may have its full effect in favour of the said Stella Mercer, if she survives the said Robert Sprigg without issue; but on condition that the said donation shall be revoked, if there should exist any child, or children born of the intended marriage, at the time of the demise of the said Robert Sprigg, or if the said Robert Sprigg should outlive the said Stella Mercer; in which latter case the said sum of twenty thousand dollars, thus given, shall revert and return in the hands and possession of the said Robert Sprigg, in the same manner as if the present donation had never taken place."

The sixth article of this contract, on which we shall have occasion to comment, provides that the wife, at the dissolution of the marriage, should be freed from the debts of the husband contracted during its continuance, by renouncing the community of gains or acquits, and take, free of all and singular the said debts, not only the property brought in marriage by her, but also what she acquired by this contract, viz. the donation of twenty thousand dollars.

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The laws applicable to this contract, and according to which it must be interpreted, are to be looked for in our Code of 1808, and in the Spanish law books which contain rules relating to the subject of donations of this nature. As a preliminary to the investigation of these laws, we think it may be laid down as true, that no text of the old Code, none of the Spanish laws, accord the tacit or legal mortgage contended for on the part of the plaintiff. The only countenance or support given to it, is found in the commentaries of Lopez on the 23d law of the 13 Tit Partida 5; in those of Gomez on the laws 50, 51, 52 and 53 of Toro. In the works of the Curia Phillipica and Febrero, which are entirely works of commentaries, and in the different authorities to which reference is made by these commentators, some difficulty occurs in proceeding to apply the law to the contract, as to the real denomination and nature of the donation stipulated in it, whether it be *donatio acti*, or *propter nuptias*: the second species commented on by Gomez, or the third, denominated *arrha*. But by giving to it either name, its nature, force and effect will not be materially different, according to the doctrine established by this commentator, resulting from his researches in the Roman civil law, and in the works of many eminent doctors who had preceded him in commenting on those laws.

If we refer to the Code of 1808, it may properly be called a donation between married persons, made by a marriage contract. But whatever may be its proper denomination, we will first examine its inherent force and effect, and the burthens imposed by it on the property of the donor, according to the Spanish laws; next, the obligations resulting from it according to the provisions of the Code in force at the period when the contract was entered into, which was subsequently sanctioned by the celebration of the marriage.

From the manner in which the donation was made by Robert Sprigg to the plaintiff, who was about to become his wife, he clearly intended to enrich her to the extent of

the sum given, in the event of his death without children from the marriage, and her survivorship. But that she should be thus enriched, at the expense and to the prejudice of *bona fide* creditors of her husband, either those who were such before the marriage, or those who by trusting him afterwards, in a fair course of dealing, held that situation at the time of his decease,—appears to us to be contrary to every principle of justice and equity, and ought to be contrary to law; and, as we have before stated, no legislative act, either in our old code or the laws of Spain, can be found to sanction injustice and inequity, such as would be a necessary consequence of success on the part of the plaintiff, in her present pretensions. The treatise of Gomez on the laws of Toro purports to be a commentary on those laws; the greatest part of his doctrines, however, appear to be entirely founded on texts of the Roman civil law, the use of which as having any binding force on the tribunals of Spain, were interdicted by express legislation of that country; leaving to that body of laws such force and effect as ought to be accorded to their provisions, considered in relation to sound reason and natural justice and equity. It is true that this author (to use his own language in No. 41 of his Commentaries on the laws of Toro, as above cited, when the question is put, whether a woman has a tacit mortgage and right of preference to secure a donation *propter nuptias*;) says: “*bre-vitur, et resolutivè dicit, quod tacita hypotheca bene competit, non tamen competit jus prælationis—cujus ratio est; quia in dote mulier tractat damno evitando; in estis, verò, donationibus, tractat de lucro captando.*” And in support of this brief solution of the question he seems to rely, principally, on the law *Assiduis* of the Roman code.

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Now admitting that this text of law supports his doctrines, it does not follow that it was, or ought to be, tolerated in Spain or her colonies, considering the interdiction of the use of the laws from which it is derived, as having the force of

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law upon the judges of that country; and if it could not legally be tolerated in Spain, it ought not to be received by us as constituting a part of the laws of that country transferred to us as purchasers of Louisiana. If, however, we admit that mere interpreters and commentators of laws, have power to establish rules, by which the inhabitants of the countries whose laws are commented on are to be bound, in relation to the tenure by which they hold their property, by rules thus established; or that the doctrines of these interpreters must be received as law, in the absence of any positive legislation to the contrary, (and this we are by no means ready to admit;) still we are of opinion that the plaintiff must fail in her present action.

According to the Spanish laws, a donation of the kind under consideration, was not permitted to be made above one-tenth of the property of the donor, to be estimated after a deduction of all his debts. See *Nueva Recopilacion*, Book 5, Tit. 2, Law 2; and *Gomez*, No. 13, in *leges Taari*, 50, 51, 52 and 53. It is true that these provisions of the original laws of the country have been changed by the Code of 1808; but according to it there still exists a limitation to the right of giving by a person situated as was the donor in the present instance: he had a father and mother then living; consequently, he could not make a donation of more than one-third of his estate to their prejudice; nor could he give anything to the prejudice of creditors who were such at the time of the donation, or in fraud of those who subsequently became such: i. e. he could not validly make any contract, having a direct tendency to cause a fraud of this sort.—See the Code of 1808 on the subject of donations generally, and the *Curia Phillipica*, p. 428, Nos. 12, 13 and 14, the article *Revocacion*.

Notwithstanding that, agreeable to the provisions of the Code, none but ascendants or descended, or their heirs, can sue for a reduction of a donation made in violation of their

right to the *legitime*; and perhaps creditors cannot directly interfere on account of an excess in a donation, as against the interest of forced heirs; yet they have most clearly a right to invoke nullity on all donations made in fraud of their just claims, and the defendant must be viewed in the situation of a creditor.

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In the present case, the petitioner states that the succession of her late husband is insolvent. How did it become so? was it on account of debts contracted by him before the donation, for which she now claims a tacit mortgage, or was it in consequence of debts subsequently contracted? Without evidence on this subject, it may as well be supposed that the insolvency alleged, was occasioned by debts of the husband existing previous to the donation, as by those which he afterwards contracted. If the first hypothesis be true, then he had no right to give anything; and if the donation was made in order to secure to his widow the sum given, in fraud of persons who might become his creditors, it is equally subject to be avoided: and that this was intended, we have no doubt, from the whole scope and tenor of the sixth article of the marriage contract.

We have already shewn that, according to the Spanish laws a donation like this, the advantages of which are claimed in the present suit, could not legally exceed one-tenth of the donor's property, net, after deduction of debts, &c. In pursuance of this doctrine, a person whose debts amounted, at the time of the donation, to more than the value of his property, could not legally and bonafidely give anything.

The burden of proof required to shew the state of the donor's affairs at the time of the donation, lies on the person claiming the benefit of such donation, as expressly laid down by Gomez in the 13th number already referred to. This proof has not been furnished in the present case, and, consequently, the plaintiff cannot succeed in her demands.— Thus far the court is unanimous. For myself I will add, that I do not believe that the tacit mortgage claimed by the ap-

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A donation prop-
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pellant has, or ever had, any fair legal existence in the jurisprudence of this country.

The provisions of our code on this subject require no further comments. It is believed that there is not a single expression in it which has a tendency, in the slightest degree, to establish the mortgage contended for on behalf of the plaintiff. The whole doctrine therein contained, on the subject of donations, appears to us to be opposed to the existence of any such hypothecation. It may not be improper to add, in conclusion, that our system of jurisprudence contains liens and tacit mortgages, created by express legislation, fully sufficient to answer all the ends of justice, and, perhaps, more than enough for the purposes of commerce.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

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DE GRUY'S SYNDIC vs. HENNEN.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Both remedies cannot be pursued at the same time, and after the *juicio ejecutivo* is turned into the *juicio ordinario*, the former cannot be again resorted to.

The execution being unauthorized by the judgment, could confer no title on the creditor by whom this irregularity was committed.

A breach of professional duty cannot affect the legal right of parties, and can only be inquired into when regularly before the court.

The circumstances of this case are these. In 1812, De Gruy, a planter, became insolvent and filed his petition and schedule in the superior court for the first judicial district—amongst the property surrendered was a tract of land at Barataria, which the syndics having in vain offered for sale, prayed the court to homologate the tableau of distribution as it stood. Thomas Durnford, one of the creditors, opposed it on the ground of its homologation invading his rights as mortgagee of the property at Barataria, for three thousand eight hundred dollars—his opposition was overruled and the tableau homologated. In 1819, Durnford filed a petition citing

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the syndics of De Gruy's, stating his mortgage and praying for seizure and sale which was granted, but was then arrested by the syndics coming in and answering. After regular process there was judgment for Durnford. A new order of seizure and sale was served and the property struck off for twenty-seven hundred dollars, which the purchasers refused to pay until it was exposed again for sale—when the former purchasers arrested the sale by paying their former bid—the court below thinking the sale defective a *pluries* order of seizure and sale was served, and the property was struck off to the defendant, Hennen, who after some time applied to the sheriff for a title—an injunction issued at the application of the syndics; there was judgment in their favor, and the defendant appealed.

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Porter, J. delivered the opinion of the court.

The insolvent filed his *bilan* so far back as the year 1812; a considerable portion of his estate was sold and reduced into cash by the syndics, who in November 1814, filed a tableau of distribution. Among the property surrendered was a tract of land at Barataria. In the tableau of distribution the syndics stated that they had exposed this tract three times for sale, and could not find purchasers.

The money on hand was distributed, and the land remained unsold up to the year 1820—in that year, one Durnford who had a mortgage on it, applied for and obtained an order of seizure and sale. The syndics made opposition to this proceeding, but after a trial on the issue joined between the parties, the court set aside the opposition, and suffered the plaintiff to proceed with his execution. The land was sold, but a third party having set up title to it, the purchasers refused to pay the price, until a good title could be given to them—on their refusal the plaintiff took out an alias writ of execution. The purchasers opposed this step, and paid the money into the hands of the sheriff, but the court was of opinion that as the sale was for cash, the bidders could not

Eastern District, first refuse payment, and then on a change of opinion on their part, claim a right to make that payment and hold the premises.—*See* 8 N. S.

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In consequence of this decision of the court, the plaintiff proceeded under another execution, and the premises were sold by the sheriff to the defendant, Hennen, who it is admitted was the agent of Durnford, the plaintiff, and purchased for him. From some cause or other, of which the record does not give information, the buyer did not obtain a deed from the sheriff, nor did the syndics ever claim the surplus money over and above the debt due the plaintiff. In the year 1829 the buyer demanded a deed from the sheriff, but was enjoined at the suit of the plaintiffs from obtaining it.

The cause was submitted to a jury in the court below, who found for the plaintiffs. The defendant appealed.

The sale is alleged to be null and void, on the ground that by law the property of a bankrupt can only be sold by his syndics, and is not subject to the execution of each individual creditor.

And if it be not null *ab initio* the plaintiffs insist the defendant has lost the right to demand a title, after suffering nine years to elapse without paying the purchase money.

While the plaintiffs and the purchasers under the execution first issued were contesting the effect of it, the former, for what object it is not well perceived, changed the proceeding (into the *juicio ordinario*) and obtained judgment against the defendant in the following words.

"Whereupon, after reading the documents annexed to the petition of the plaintiff, and the court being of opinion that the claim of the plaintiff has been sufficiently proved—order, adjudge and decree, that judgment be entered in favor of the plaintiff against the defendant, for the sum of three thousand eight hundred dollars, together with interest thereon, from the day of the judicial demand, viz. 23d April, 1829, until paid, and costs of suit."

However, on the decree of the supreme court being ren-

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Both remedies cannot be pursued at the same time, and after the *juicio ejecutivo*, is turned into the *juicio ordinario*, the former cannot be again resorted to.

The execution being unauthorized by the payment, could confer no title on the creditor by whom this irregularity was committed.

A breach of professional duty cannot effect the legal right of parties, and can only be inquired into when regularly before the court.

dered, setting aside the sale in the *juicio ejecutivo* the plaintiff seems to have reverted again to that mode of proceeding, for we find that he took out a pluries order of seizure, and under it the land was sold to the defendant. This was quite irregular. It has been already settled that both these remedies cannot be pursued at the same time, and that after the *juicio ejecutivo* is turned into the *juicio ordinario*, the former cannot be resorted to. In this instance the plaintiff instead of issuing a writ of *feri facias*, (if indeed he could have taken out an execution against the insolvents property) in pursuance of his judgment, chose to continue the original execution process, and sell the property under it. The execution being unauthorized by the judgment, could confer no title on the creditor by whom this irregularity was committed.

The attorney who represents the present plaintiff, was the gentleman under whose advice the plaintiff in execution first resorted to the *juicio ejecutivo* to enforce his claim against the syndics of the insolvent. And it has been complained to the court, as a breach of professional duty, that he should now attempt to set aside proceedings which emanated from his counsel and advice. The conduct of this gentleman cannot affect the legal rights of the parties; and it would not be proper in us to express any opinion on it, unless regularly brought before the court.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

MILLAUDON vs. ALLARD—BANK OF GEORGIA INTERVENING.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The third possessor of property subject to several mortgages and who has purchased from his vender a right to the first mortgage, when the property is sold by the sheriff on the application of subsequent mortgages, is entitled to be first paid out of the proceeds, although he becomes the purchaser himself.

A mortgage in favor of an absent person, executed and registered by the

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Eastern District, mortgager, although not accepted by the mortgagee, takes precedence of a
July 1831. posterior mortgage duly accepted and registered.

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The facts are stated in the opinion of the court by

Martin, J.

This was a case of a writ of seizure and sale by the mortgagee. The premises were sold. The Planters Bank of Georgia intervened, being a posterior mortgagee.

The district court was of opinion that as the defendant, the third possessor, had had the mortgaged premises adjudicated to himself, there was no sale, as they were his before the adjudication, and he could not purchase his own thing. The proceedings in the case presented no obstacle to the exercise of the intervening parties right as a mortgagee, and he directed a writ of seizure and sale to issue in his favor.

From this judgment the defendant appealed.

The record presents the following case:

1. On the 25th of June, 1822, Lewis N. Allard, the defendant's father, sold to Richardson one undivided half of a tract of land and forty-eight slaves, on which he retained a mortgage for \$30,000, part of the price, afterwards credited by a partial payment of \$25,000.

2. Two days after, June 27th, 1822, Richardson gave a mortgage to Landreaux, on the premises for \$16,000 and interest.

3. On the 17th of March, 1823, Richardson mortgaged the undivided tract of land and slaves to Pierre Allard, to whom he also mortgaged twenty-three other slaves, for a debt of \$8000 and interest. The mortgagee, who was then absent, accepted the mortgages on the 16th March, 1823.

These two last mortgages were assigned to the plaintiff Millaudon, and form the ground of the present suit.

4. On the 12th April, 1823, the undivided land and negroes being encumbered by the above three mortgages, and the 23 slaves by the last; Richardson sold the whole to Procter, who covenanted to discharge all the above mortgages, and gave his note to Richardson for twenty-five thousand

dollars, mortgaging the above property for the security of the payment of the note. Eastern District,
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This note was transferred to J. & C. Bolton, and by them to the Planter's Bank, the intervening party, and is the basis of the intervention.

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On the 31st of March, 1824, Proctor reconveyed to Richardson the whole property purchased from him—the latter reassuming the payment of the mortgage to Louis N. Allard, Landreaux and Peter Allard or Millaudon, and of Procter's note for twenty-five thousand dollars, the property of the Bank—and he mortgaged the whole property to Procter for the security of the performance of his covenant.

5. On the same day Richardson conveyed all the premises to Louis N. Allard, receiving in payment six thousand dollars in cash, in discharge of twenty-five thousand dollars, the amount of the first mortgage, and his vendee assumed the payment of those to Landreaux and P. Allard or Millaudon. Richardson undertaking to discharge the note of Procter in the possession of the Bank.

6. Lastly, on the 29th of October, 1824, Louis N. Allard sold to his son, the present defendant, the whole property above mentioned, for \$120,000. Forty thousand was paid in cash, and the balance was promised to be paid in ten yearly instalments: but the vendee reserved to himself the right of applying the amount of the deferred payments to the total or partial discharge of the mortgages of Landreaux and Pierre Allard or Millaudon. No mention was made of Procter's note, nor of the mortgage for the security of its payment.

Matters were in this situation when the plaintiff, assignee of P. Allard, obtained a writ of seizure and sale, on which the premises were sold: the undivided tract and slaves for \$40,000—the twenty-three slaves for \$11,350—in all, \$51,350. The sheriff deducted from this sum, \$220 for costs, and paid the plaintiff's claim \$16,783, and paid the balance, \$34,347, to the defendant.—*Code of Practice* 704.

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This sum being insufficient to discharge the two first mortgages, (Louis N. Allard and Landreaux) the sheriff, the proceeds of the sale being exhausted, gave the defendant a release of posterior mortgages—*Code of Practice* 708—after having received his bond for indemnity and the security of the rights of other parties.

Four months after, viz. on the 18th of February, 1830, the bank intervened, by procuring a rule on the defendant to shew cause why he should not pay the sum due on Proctor's note, out of the proceeds of the sale on Millaudon's order of seizure and sale.

The claim of the bank was resisted on the ground that the defendant was subrogated to his father's right on the first mortgage for \$25,000, and to Landreaux's right on the second for \$16,000, the capital, of these two sums (\$41,000) exceeded the balance received from the sheriff.

We think the district judge erred in concluding that the defendant acquired no right by the sale; that the thing was his own before the sale, would have continued so without the sale, and is no more than his own after it.

The third possessor of property subject to several mortgages and who has purchased from his vender a right to the first mortgage, when the property is sold by the sheriff on the application of subsequent mortgages is entitled to be first paid out of the proceeds, although he becomes the purchaser himself.

The sheriff sold the rights of Richardson, the mortgagor, as they existed at the date of the mortgage, and by the purchase the defendant acquired what he did not possess before, the release of the mortgagee's claim; so that there was an actual sale, the property was transferred to the purchaser, and the subsequent mortgagee can only exercise his rights on the balance remaining after the discharge of this preceding mortgage. To ascertain what these rights are remains to be done.

This we are enabled to do by an agreement, which the parties have placed on record, that the proceeds of the sale are in court, subject to distribution; the said proceeds being represented by the defendant's bond to the sheriff, which that officer has returned into court.

This leads us to the consideration of the defendant's right to retain, first, \$25,000, the amount of the first mortgage.

with interest; secondly, \$16,000, that of the second, with interest. As the principal absorbs the whole balance, the interest will not be taken into view.

I. As to the first, on Louis N. Allard's mortgage, it is objected by the appellee's counsel, that the debt of which the mortgage was an accessory, has been extinguished by payment is no longer due, and, *ergo*, the accessory has ceased to exist.

But the appellant's counsel urges that the mortgagee creditor, who purchases the premises is as if subrogated to himself, and preserves his mortgage in regard of a posterior mortgage, and the confusion which results from the purchase suspends, indeed, his mortgage, but does not absolutely destroy it:—he cannot have a mortgage on his own estate.

This principal appears to us to be correctly established by *Merlin*, 13, *Repertoire verbo subrogation de personnes*. *Sec.* 4. He says the effect cannot have a longer duration than the cause. If the latter be temporary only the former cannot be perpetual. He cites *President Favre liv. 8. tit. 15, Dic. 8. Creditorem qui rem sibi obligatam emit a debitori aut in solutum accepit, jus idem pignoris quod in ea habent remississe et amississe, certum est quasi confusionis cujusdam postestate. Sed si rem postea evinci contingat jus suum posteriori restitueret ac si quem ablata pignoris obligatio fuisset.*

Had the defendant before he purchased the premises, enjoyed a servitude or incorporeal right on the premises, they would have been extinguished by confusion; for one cannot be the creditor and debtor of a servitude; have a right of way on an estate of which he has the fee simple; but on his relinquishment to an anterior mortgage or on a sale at the latter's instance, the servitude or incorporeal right would be revived.—*Civil Code* 462, *art.* 50.

The purchase of the land cannot have the effect of destroying the claim of the creditor, unless the title passes to him

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A mortgage in favor of an absent person, executed and registered by the mortgager, although not accepted by the mortgagee, takes precedence of a posterior mortgage duly accepted and registered.

We therefore conclude that Lewis N. Allard by purchasing the premises, did not destroy his mortgage so as to let in posterior ones.

2. As to the mortgage of Landreaux it is not pretended to be discharged.

But the appellee's counsel has urged, that the mortgage of Pierre Allard has not a priority over that of the bank—because, although it was executed and recorded before the bank obtained its, the latter must be preferred, because the former did not become effectual till its acceptance by the mortgagee, which was posterior to the date of the mortgage of the bank and its registry.

We think an absent person has the benefit of an engagement contracted towards him. Pareciendo que alguno se quizo obligar a otro por promision o por algun contrato, o en otra manera, sea tenido de cumpliraquello que se obligo, y no puede poner exception que no fué hecha stipulacion, que quiere decir prome, temiento, con cierta solemnidad de derecho, o que fué hecho el contrato o obligacion entre ausentes o que non fué hecho ante escribano publico, o fué hecha a otra persona privada, en nombre de otros, entre ausentes, o que se obligo alguno que daria a otro o haria alguna cosa, mandamos que todavia vale la obligacion y contrato que fuere hecho, en qualquiera manera que parezca que uno se quizo obligar a otro.—*Recopilacion de Castilla* 5, 6. 2.

See *Duchamp et al. vs. Nicholson*, 2d *Martin*, N. S. 672; *Marigny vs. Remy*, 3 *id.* 607.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the rule obtained by the appellee's be discharged with costs in both courts.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
Supreme Court
OF THE
STATE OF LOUISIANA.

SUPREME COURT—WESTERN DISTRICT,
OPELOUSAS, SEPTEMBER, 1831.

Western District,
September 1831.

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vs.
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LABBE'S HEIRS vs ABAT ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE
JUDGE OF THE SIXTH PRESIDING.

The construction and effect of an act of voluntary separation, and of a division of property between husband and wife, made in 1805, before the adoption of either of the civil codes, must be determined by the laws of Spain.

According to these laws the husband and wife were considered so far separate persons, that they could validly enter into any onerous contract—a sale being the example given to illustrate this doctrine.

The husband and wife were prohibited from making donations to each other during marriage, of property actually in possession; but the wife might renounce her right to the acquets at any time *before, during and after* the dissolution of the marriage.

A contract in which husband and wife mutually agree to separate, divide, and each take a specific portion of the community property, and renounce all right and claim to the community of acquets and gains, partakes strongly of the nature of a contract of *exchange*, by which each of the parties gives up all claim to the *whole*, in consideration of obtaining a distinct right and title to a *part* of the matrimonial community property.

Such a separation and division was strictly speaking a partition of common property, and cannot be assimilated to a donation.

The contract of exchange, in 1805, between the husband and wife operated as a good and valid separation of goods between the contracting parties,

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and a dissolution of the community previously existing between them, and renunciation of the acquets and gains subsequently acquired.

The voluntary separation of husband and wife, did not produce a legal separation *a menso et thoro*. The husband would still be bound to provide for her maintenance.

The circumstance of the husband having an adulterous intercourse with his *mulatto slave* in the common dwelling, may have induced the wife, the more willingly to *abandon his bed*; but is not such an act of legal constraint and coercion on her, or of immorality in him, as to render the contract of exchange, and dissolution of the community of property, *null and void*.

If the wife makes a concealed donation by acknowledging subsequently to the marriage, that her husband brought in twenty-five hundred dollars when in fact it was owned by her at the time, such donation by the Spanish laws is only revocable during the life time of the *donor*, and at her instance,

In April 1826, Margaret Decoux, wife of J. B. Bernard Hiliare Decoux, and Julia Decoux, widow of Louis Pellerin, deceased, legal heirs and representatives of Charlotte Julia Labbé, deceased, filed their petition in the district court for the Parish of St. Martin, against Jean Pierre Descuirs, the husband of C.J. Labbe, by a second marriage, on her part, claiming of the defendant sundry paraphernal property, alleged to have been brought into the marriage by their deceased mother with said Descuirs; and one half of the community which is alleged to have existed between them until dissolved by the death of the wife in 1825.

A marriage contract was entered into between C. J. Labbé, (then widow Decoux) and J. P. Descuirs, stipulating that the wife brought \$1095 37 worth of property into marriage; the husband's to be ascertained by inventory after marriage, and stipulating that a community of property should subsist between the spouses. They were then married, October 31st, 1781. The parties lived together until May, 1805, when they entered into a voluntary agreement to separate, and to live separate both in person and property. The act of voluntary separation was drawn up and signed, May 21st, 1805, and acknowledged before Henry Hopkins, commandant of Attakapas, the 25th of the same month.

The parties lived and administered each one's property separately, from that period until the death of the wife in 1825. The plaintiffs had an inventory of all Descuirs' estate taken, after the death of the wife, and allege that the community of property never ceased to exist between husband and wife, notwithstanding they lived separate, and had divided their property at the separation.

In December, 1826, Descuirs died, which was suggested to the court in April, 1827. The suit was revived against his heirs. They all renounced, or let judgment go by default, except *two sets*; viz. the representatives of *Magdelione Descuirs*, late wife of Barré, and of *Lucelle Descuirs*, late wife of A. Boutté, deceased; both collateral heirs of J. P. Descuirs, the late defendant. These two sets of heirs put in answers claiming half the community, if it should be decided to have existed, and reserving all their other rights until a final decision of this suit. At the death of Descuirs one Antoine Abat, a money-broker of New-Orleans, set up a claim to his whole succession, by virtue of an authentic act of sale, passed before P. Pedesclaux, notary public for the parish of Orleans, dated May 19th, 1821. Abat came and took possession of the estate, and was proceeding to dispose of it at public sale, when he was stopped by an injunction, obtained by the plaintiffs, restraining him from any further proceedings, alleging the sale from Descuirs to him to be *simulated* and *fraudulent*.

The injunction case was consolidated with the original suit.

In April, 1829, the plaintiffs were ordered to amend their original petition, and set forth their demand, cause of action, and property claimed, *explicitly*. They did so, and conclude by praying for the restitution of all the wife's paraphernal or dotal property, for half the community alleged to exist in relation to Descuirs' estate, and for the crops made since the death of their ancestor, and for a final partition and settlement with Descuirs' succession. They also pray that the sale from Descuirs to Abat may be declared to be simu-

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lated, and in fraud of their rights, and accordingly annulled and set aside.

The sale to Abat is alleged to be *fraudulent* and *simulated*:

1st. Because no valuable consideration was given:

2d. Because, if such sale was made for nearly the whole of Descuir's succession, it is *simulated* and *fraudulent*, being made with a view to defraud the petitioners of their just rights:

3d. That the property intended to be conveyed, never ceased to belong to Descuirs, and was attempted to be transferred through Abat, for the benefit of a person incapable of receiving a legacy:

4th. That if ever Abat advanced money to Descuirs, he has been abundantly remunerated from the crops he has appropriated to his own use, raised from the plantation since the death of Descuirs:

5th. That as most of the property belonged to the petitioners' mother, it could not be alienated by Descuirs without a valuable consideration.

On the 4th of October, 1829, Abat, by his counsel, D. Seghars, filed exceptions to the petition, and an answer to the merits.

He excepted to the petition—1. That this is an action of partition of a pretended community with which he has nothing to do.

2. Because it purports to be an action of revendication of sundry slaves, without alleging the title by which they are held:

3. Because it purports to be an hypothecary action for the exercise of a right the petitioner's ancestor had to some property, which they allege to have been sold by the husband, and do not state the amount, or specify the property against which this action is to be exercised:

4. Because at the same time it purports to be an action of simulation, directly against this respondent:

5. Because he denies the plaintiff's right to cumulate all those distinct actions, and by making him a party to them, and subjecting him in case of success in either, to costs of suits in which he has no interest.

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Answering to the merits, he pleads a general denial: And further answering, sets up an act of sale, from Descuirs to him of his lands and twenty-two slaves, &c. *for a valuable consideration*. He avers he has been in peaceable possession of all this property from the passing of the sale, May 19th, 1821, until arrested by the injunction of the plaintiffs. He denies that any community of property existed between J. P. Descuirs and his late wife, since their voluntary separation in 1805, that Descuirs had a perfect right to sell his estate, and that he was in full possession and has sustained damages to amount of five thousand dollars, by the injunction of plaintiffs.

On the trial, documentary and parol evidence was produced, directed mainly to two points.

1. As to the validity and effect of the voluntary separation of Descuirs and wife in 1805.

2. The validity of the sale of his plantation, slaves, &c. from J. P. Descuirs, to Antoine Abat, in May, 1821.

In regard to the separation, it was proved by the plaintiffs—that ever since their separation in 1805, they continued to live and administer their property separately. Madame Descuirs manifested no desire to return and live with her husband. She said she separated from her husband because he lived with his domestic Josephine, and had more regard for the mulatress than for her: That she never pretended to have any reclamations against her husband since the separation. Josephine and Descuirs continued to live together, and she had a son by him, called Charles. Descuirs acknowledged this child to be his son, and the latter called him father. He also boasted that Charles would figure in the society of Paris, to which he sent him to be educated.

On the part of the defendant it was shown, that Descuirs

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and his wife both avowed always after the separation that they were separated in property; and lived and transacted their own business. Madame Descuirs lived on a separate plantation, and bought and sold her negroes and transacted all her own affairs. She ever spoke of her husband afterwards with the greatest *indifference*. She contracted all debts in her own name with the merchants of St. Marieville.

2d. The sale to Abat.—Plaintiffs proved that Descuirs always lived, from the time of separation from his wife up to his departure for France in 1825, on the same plantation, working the same slaves, and possessing the same stock and farming utensils which were claimed by Abat in virtue of the sale to him in 1821; that Descuirs shipped and received the proceeds of the crops, and paid physicians' bills and other expenses of the farm. Descuirs was a prudent, economical man, who never contracted large debts, nor lived extravagantly. He was not embarrassed. His plantation and all the stock and other utensils, claimed by Abat, were inventoried by the parish judge in 1825, in his (Descuirs) own name. The parish judge had several conversations with him after the pretended sale to Abat in 1821—one soon after his return from New-Orleans, in which he said: "*Qu'il avait vendu sans avoir vendu; et qu'il pourrait ravoir son habitation quand il le voudrait.*" One witness dined with Descuirs in 1823 or 1824, who joked him about making him his heir, in order to disinherit his nephew.

Josephine continued to live with Descuirs on the plantation until his departure for France, when he took her with him. She returned from France to New-Orleans with him. In conversation, he induced several persons to believe he intended to leave all his property to Josephine and Charles her son; and that he employed Porter and Brent to write his testament, *willing* his estate to Josephine and Charles. Josephine, since his death, continues to live in a fine house in New-Orleans, which is also well furnished. Abat never

appeared on the plantation, or to exercise any acts of ownership over it, until after Descuirs departed for France. He said, before leaving it, he had rather die on his way to France than live here. His conduct on starting induced the belief he intended to convey away his property.

On the part of the defendant Abat, witnesses said that, in 1825, after Descuirs started for France, Abat took possession of the plantation, lands, and stock, &c. and put an overseer on it. He received the crops. In 1827, after Descuirs' return to New-Orleans, and death, Abat then offered the plantation, negroes, and all the stock, &c. at public sale; and was proceeding to sell it, until stopped by the plaintiffs injunction;—that Descuirs sold all his household furniture and horses before he set out for France. One witness says he saw Descuirs in New-Orleans at the time he sold his plantation to Abat. He told witness he had sold it, and intended to go to France, but he had agreed to go and live on the farm, to save Abat the expense of hiring an overseer, and to sell some moveables, &c. Witness heard that Descuirs took \$25,000 or \$28,000 with him to France, and invested it in property; that he heard he had purchased to the amount of 120,000f. and again sold it for 96,000f: *all hearsay*. A clerk in the notary's office says, when Descuirs passed the sale of his plantation and slaves to Abat, the notary counted the money for the price, and paid it over to Descuirs, who took it off with him; the sum appeared not less than twenty, nor more than thirty thousand dollars: it was in bank notes. Witness don't know who brought the money to the office: thinks it was not Abat.

There was judgment for the plaintiffs in the court below, and the defendant appealed.

Simon, for plaintiffs, made the following points:

1st. That the act under private signature, made the 21st May, 1805, contains a stipulation of *separation* of property, and of *dissolution of the community*; that it was done amicably and by mutual consent of the parties.

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2d. A voluntary separation of husband and wife, was not permitted by the Spanish laws; and such separation did not put an end to the community of property.—*Feb.* part 2, book 1, ch. 4, nos. 51 and 52. *Ibid*, ch. 4, nos. 1, 2, 46 and 50.

3d. The same rule of law prevailed in France. A separation of husband and wife could not be even submitted to arbitrators, either in Spain or France.—*Poth. Com.* Vol. 2, § 542, 492. *Ibid*, *Traité des Droites desepoux pour Dabaution*, pp. 73, 164. *Par.* 4, title 10, law 8. *Poth. Com. du Mar.* vol. 2, p. 87, § 517 and 518. *Leyislation Judiciare*, p. 371, *Actes de Notoriété du chatelet de Paris*, p. 178

4th. A judicial sentence is necessary to destroy the community of property, after it once exists.—7th *Mar.* N. S. 50

5th. The renunciation of the community is the *consequence*, and not the *object*, of the act of separation of 1805. Before renouncing, the community must be dissolved and open. This right of renunciation is given to the wife, for her benefit, and for the purpose of avoiding the payment of debts contracted during marriage by the husband. There was no such object in view by the wife, in the act of separation in 1805.—*Gomez ad leges Touro*, 633 and 631, and authorities cited by defendants counsel on the 60th law of Toro. *Poth. Com.* vol. 2, § 542.

6th. The Spanish laws, in giving to the wife the right of renouncing to the community, in order to avoid the payment of the debts of the community, (which renunciation, it is contended, is the *consequence*, and not the *dissolution* itself,) have pointed out certain formalities which, being fulfilled, make the renunciation binding on the wife; but which have not been observed in this case.—*Feb.* part 2, book 1, ch. 4, nos. 59 and 60. *Ibid*, part 1, ch. 5, nos. 9 and 10. *Ibid*, part 1, ch. 5, § no. 43.

7th. All the authorities cited by the adverse counsel go to shew that, under the Spanish laws, all donations between husband and wife are prohibited, and, consequently, the acts containing such donations are *null and void*. This is admit-

ted; and it seems that the act of 1805 contains an *indirect donation* from the wife to her husband, not only by diminishing the amount of her rights, but also by acknowledging his having brought in marriage \$2500, which is proven by *nothing* but this *acknowledgment*.

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8th. The sale made by Descuirs to Abat was made in fraud of the wife, and is fraudulent and simulated, being in prejudice of her *rights* and those of the *forced* heirs, it ought to be annulled and set aside.—*Recop.* title 4, book 10, law 5.

9th. Simulation may be proved by presumptions. The evidence in this case clearly proves fraud and simulation from the presumptions arising from the mass of facts proven.—*Syrey*, vol. 2, 16. 3d *Martin*, N. S.

10th. The evidence in the cause shews, that the motives and causes of the act of separation of May 21, 1805, were immoral; because the husband lived in open *concubinage* with the *mulatresse* Josephine. On this ground the act ought to be annulled and set aside.

Bowen, on same side, contended:

1st. That the motives which led to the act of separation of 1805, between the husband and wife, were so *immoral* that it completely vitiates it; that no acts of the wife, under such circumstances, could have any binding effect; she was *constrained* by the husband's bad and *immoral* conduct to consent to the execution of the act, and no law would require its enforcement in a court of justice.

2d. That the sale from Descuirs to Abat of his estate, is *fraudulent* and *simulated*, as is abundantly proved. Such being the case, it must be annulled and set aside, as far as it relates to the rights and interests of the plaintiffs.

Seghers, for defendant, urged the following points, and *errors* in the judgment of the district court.

1st. The judge *a quo* erred in deciding that, by the act of May, 1805, and of the separation of the parties, the wife had renounced the *gananciales*, and that this renunciation is not

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binding on her, because she has not *expressly* and solemnly, before a notary, renounced all the laws specially in her favour.—*Febrero*, part 2, vol. 1, p. 227, nos. 57, 58, 59, 60. *ibid*, part 1, vol. 2, p. 72, no. 117, and p. 159. Note 44 on no. 117. *Ibid*, part 1, vol. 3, p. 440, no. 21. *Gomez ad leg. Tauri*, pp. 633, 634. *Maticuro*, folio 271, verbo gloss. 1, no. 2, on law 9, title 9, book 5 of *Recopilacion*. No. 9 of same gloss. *Azevedo*, vol. 2, pp. 311, 312, gloss. 1, 2, 3, 4; or the same law of the *Recopilacion*; and which is also the law 60 of Toro. *Nueva Recop.* book 5, title 16, law 2.—*Azevedo*, vol. 2, p. 418. *Matienzo*, p. 419, recto. *Moreau's Partidas*, vol. 2, p. 1246, rule 27. *Novissima Recop.* book 3, title 2, laws 3 and 5. 3d *Martin*, N. S. 607. 2d *Martin*, N. S. 672. 1st *Martin*, 259.

2d. The judge *a quo* erred in deciding that the plaintiffs were entitled to recover one-half of the estate of Jean Pierre Descuirs, which he has conveyed to the defendant, on the ground that a community of property continued to exist, after the separation between Descuirs and his wife; and that the said alienation to defendant was fraudulent and simulated, and should be annulled and set aside.—*Febrero*, part 1, vol. 2, ch. 10, no. 10, p. 364. *Gomez, variae resol.* vol. 2, p. 434, no. 3. *Nov. Recop.* book 10, title 4, law 5. *Ibid*, book 3, title 2, laws 3 and 3.

3d. The judge *a quo* erred, in not dissolving the injunction sued out by the plaintiffs against the intended sale of the property by Abat, and in not awarding to him the damages he has suffered in consequence of that injunction.

Mazureau on the same side.

**Mathews, J.* delivered the opinion of the court.

The plaintiffs in this case claim from the defendants an account of the estate of their deceased mother, which, they allege, was held in community with him; and pray a decision

**Porter, J.* took no part in the decision of this case, being out of the state, under leave of absence, when it was argued.

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in their favour for whatever amount may be found to have been the property of the deceased. Before judgment could be rendered, the defendant Descuirs died; and the suit was prosecuted against his heirs, of whom a great number were cited; and many of them formally renounced the inheritance.

During the progress of the cause in the court below, the plaintiffs brought suit against a certain Antoine Abat, to cause a conveyance made to him by Descuirs, during his life-time, of all the property of the latter, to be annulled, on the grounds of simulation and fraud. These suits were consolidated, and proceedings took place on them, in virtue of which judgment was rendered in favour of plaintiffs, from which the defendant Abat appealed.

The principal facts of the case, as they appear by the documents and testimony, are as follows: In the year 1781 the mother of the plaintiffs (then the widow of Jos. Decoux) and Jean Pierre Descuirs entered into a marriage contract, by which they formed a community of property. The part of this community which was to be brought in by the husband, was not specified at the time, but was, by agreement, to be ascertained at some future period. That brought by the wife was estimated at \$1095 37. Their marriage was celebrated in pursuance of this contract. They lived together under the matrimonial union, holding their property in community, the wife having a right to one-half of the acquets and gains, until 1805. On the 21st of May, in that year, they entered into a contract, by which both parties agreed to a separation of property, and a dissolution of the community, in presence of several of their neighbours, called in to assist them in the division of the estate—which was divided, both as to the *biens propres* and the *gananciales*, up to that period, each party taking separate possession of the property assigned to them under this division. They continued in this state of separation until the death of the wife, each party having the use and enjoyment of the portion assigned to them, separately. The motives for this sepa-

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ration are not made known in the contract; it is simply stated, that it was done by mutual consent. There is, however, a probability raised by the testimony of some of the witnesses, that the wife acquiesced in this measure the more readily, in consequence of a supposed criminal intercourse between her husband and a young mulatto slave, belonging to the household: for, after the separation of property and dissolution of the community, the spouses lived no longer together. There is no evidence of any personal abuse, or ill-treatment exercised by the husband towards his wife, or that he drove her by force from his bed and board. At the time of the dissolution of the community, the property which each of the parties brought into it, originally amounted, by estimation, to \$25,000; and on this basis the whole, both capital and profits, was equally divided. Abat, the appellant, produced in evidence an authentic act, clothed with all the formalities of law, by which it appears that Descuirs' sold to him all his estate, &c. The act of separation, &c. which was made in private form, was acknowledged by the parties before a person exercising the functions of judge and notary, immediately after the occupation of Louisiana by the United States, was recorded, and a copy is taken from the archives of the parish of St. Martin.

On these facts several questions of law are raised:

1st. Whether the act of separation of goods, and dissolution of the community, is valid and binding on the parties, in any respect, according to the laws in force in this country, at the time of its execution?

2d. If good as to the *gananciales*, whether it is not void as to the \$25,000 acknowledged to have been brought into the community by the husband, on the ground of this part of the stipulations in said act being a disguised donation to the husband by the wife, not tolerated by law?

A *third* question relates to the truth and genuineness of the deed of sale from Descuirs to Abat.

For a solution of the first two of these questions we must

The construction and effect of an act of voluntary separation, and of a division of property between husband and wife, made in 1805, before the

resort to the Spanish laws, which afford the only *legitimate* rules by which the acts of the parties are to be construed. According to these laws it is clear that husband and wife were considered so far separate persons; that they could validly enter into any onerous contracts between themselves. A sale is the example given to illustrate this doctrine. They seem to have been prohibited only from making donations to each other, during the marriage, of property actually in possession. By the same laws the wife was permitted to renounce her rights to the matrimonial acquets and gains, at any time before, during, or after the dissolution of the marriage. These rights and disabilities are fully established by *Gomez ad leges Tauris*, and in his treatise entitled *Barce Resolutiones*, by *Febrero*, *Maliengo*, and other authorities.—See *Gomez en leges Taure*, 633 and 634. *Varce Resolutiones*, p. 434. *Maliengo*, folio 271. *Verzo*, no. 2. *Febrero*, part 1, ch. 10, § 1, no. 2; and part 2, book 1, ch. 4, § 2, no. 57, 58, 59 and 60.

The contract by which Descuirs and his wife agreed, in 1805, to a separation of property, and dissolution of the matrimonial community which had previously existed between them, may be considered as partaking strongly of a contract of exchange, by which each one of the parties gave up his common right or claim to all the property, in consideration of his having obtained a separate and distinct title to a part. It was, strictly speaking, a partition of common property, and cannot be assimilated to a donation. It is well known that contracts of exchange, and agreements to divide a common property, create many obligations between the parties to such contracts very similar to those which arise out of the contract of sale. We, therefore, conclude that the contract of 1805 did operate a good and valid separation of goods between the contracting parties, and dissolution of the community which previously subsisted between them, and a consequent mutual renunciation of any community of acquets and gains which may have been acquired, subsequent to that

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adoption of either of the civil codes, must be determined by the laws of Spain.

According to these laws the husband and wife were considered so far separate persons, that they could validly enter into any onerous contract—a sale being the example given to illustrate this doctrine.

The husband and wife were prohibited from making donations to each other during marriage, of property actually in possession; but the wife might renounce her right to the acquets at any time before, during and after the dissolution of the marriage.

A contract in which husband and wife mutually agree to separate, divide, and each take a specific portion of the community property, and renounce all right and claim to the community of acquets and gains, partakes strongly of the nature of a contract of exchange, by which each of the parties gives up all claim to the whole, in consideration of obtaining a distinct

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right and title to a part of the matrimonial community property.

Such a separation and division was strictly speaking a partition of common property, and cannot be assimilated to a donation.

The contract of exchange, in 1806, between the husband and wife operated as a good and valid separation of goods between the contracting parties and a dissolution of the community previously existing between them, and a renunciation of the acquets and gains subsequently acquired.

The voluntary separation of husband and wife, did not produce a legal separation *a mensa et thoro*. The husband would still be bound to provide for her maintenance.

The circumstance of the husband having an adulterous intercourse with his mulatto slave in the common dwelling, may have induced the wife, the more willingly to abandon his bed; but is not such an act of legal constraint and coercion on her, or of immorality in him, as to render

period, by the parties to the contract. It cannot be considered as having produced a legal separation, *a mensa et thoro*.

The husband would probably have been obliged to provide for the maintenance of his wife, or to have afforded her bed and board, had she required it at his hands. It is true, the testimony shews, that after the execution of this contract, a voluntary separation of persons took place between the parties; but we have no evidence of any violence, or actual constraint exercised by the husband or his wife. The suspicion of an adulterous intercourse between him and his mulatto slave, may have had its effect on his wife to induce her the more willingly to abandon his bed. But, perhaps, this contract would not have afforded a legal ground for a separation, as the municipal laws of Spain and, probably, of most other countries, are much more indulgent to acts of incontinency done by husbands, than offences of this kind committed by wives. The reason given by legislators for this distinction, is, that in the one case there's danger of a spurious offspring, which does not exist in the other. This is true. And it is perhaps equally evident, from the different degrees of rigour applied by law to the same moral offence in the different sexes, that men, and not women, have, in all ages, been the makers of laws. Be this as it may, we are of opinion that the conduct of the husband, in the present instance, did not amount to a legal constraint or coercion of his wife, in such a degree as to authorize a court of justice to declare the contract null. Having been made by parties capable of contracting, and by mutual consent, it should be held as valid *in toto*, unless some of its provisions contain stipulations reprobated by law. From these observations, applicable to the entire agreement, we come to consider that part of it which is alleged to cover a donation from the wife to the husband.

In relation to this question we may be very brief: for, admitting that a concealed donation was made of the \$2500, acknowledged to have been brought into the community by

the husband, being unsupported by any other evidence except this acknowledgment, it was revocable by the laws then in force, only, during the life-time of the donor, and at her instance; in other words, it became valid by her death.—*Gomez in leges Tauri*, laws 50, 51, 52 and 53, no. 65.

With regard to this contract not having been sanctioned by the oath of the wife, we are of opinion that this omission does not, in any manner, impair its legal validity. If its stipulations are directly contrary to law, then such an oath could not give them validity *in foro legis*; and if they are in accordance with law, they require not the sanction of an oath to make them valid and binding on the parties.—See 11 *Mar.* 529.

Being of opinion that the plaintiffs have not shewn a right to any part of the succession of J. P. Descours, and as the contest between them and Abat depends solely on the recognition of such right in them, it is deemed unnecessary to examine the third question proposed, which relates to the sale from Descours to him.

It is therefore ordered, that the judgment of the district court be avoided, reversed, and annulled. And it is further ordered, adjudged, and decreed, that judgment be here entered for the defendants in both those cases as consolidated, with costs in both courts; reserving to the heirs of J. P. Descours their rights (if any they have) to pursue Abat, to obtain a rescision of the sale made to him by their ancestor.

BOREL vs. FUSILLIER.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT,
THE JUDGE OF THE SEVENTH PRESIDING.

When a stipulation is made, prolonging payment, on condition that the debtor pays interest annually; the latter must shew a performance of the condition on his part, to entitle him to its benefit.

If the defendant relies on the performance of certain conditions which entitle him to an extension of credit, he must shew by proof, a performance—the plaintiff is not required to shew a non-performance.

Western District,
September 1832.

LABBE'S HEIRS:
vs.
ABAT ET AL.

the contract of exchange, and dissolution of the community of property, null and void. If the wife makes a concealed donation by acknowledging subsequently to the marriage, that her husband brought in twenty-five hundred dollars when in fact it was owned by her at the time, such donation by the Spanish laws is only revocable during the life time of the donor, and at her instance.

Western District,
September 1881.

BOREL
vs.
FUSILLIER

The allegation that interest was not paid is a *negative assertion*, which according to the rules of evidence, throws the proof on the adversary.

On the 28th of February, 1828, Magdelaine Borel, sold to the defendant, F. Fusillier, several slaves for 3,500 dollars. The act of sale contained the following clause, upon which this case turns:—"and the balance (thirty-one hundred dollars) to be paid by the said Fusillier, in three equal annual instalments, from and after the date hereof; and each instalment if not paid when due, with 8 per cent per annum interest from *that time* until paid; *and it is further agreed, &c. that the said F. Fusillier is not to be compelled to pay any of the said instalments until two years after the last one becomes due, by paying interest at the rate of 8 per cent per annum on each instalment ANNUALLY, after they respectively become due.*" This suit was brought to recover the last instalment, which became due the 28th February, 1831. The defendant denied that it had become *due* and *payable* according to the stipulations in the act of sale. The plaintiff had judgment and the defendant appealed.

Brownson, for plaintiff, contended that the right claimed for the defendant is merely a conditional one; and that to entitle him to its benefit, he must shew a compliance on his part with the obligation which he has contracted.

Simon, for defendant, argued to shew, that he was not bound to pay the amount sued for, until two years after the instalments become due, on paying 8 per cent. per annum interest: No interest is yet due on the amount sued for, so that if it be considered as a condition, *it is not yet forfeited.*

2. As to the proof of payment of interest on the second instalment, the benefit given by the act of postponing the payment to two years, is to be applied to each instalment separately; and that the forfeiture of the condition as to one instalment, does not deprive the defendant of the right of delaying the payment of the others.

3. And again, the clause about delaying the payment is a mere stipulation of interest and *not* a condition; and that the

defendant owes nothing until two years after the *last instalment* becomes due, at which time he will owe the principal and interest.

Western District,
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BOREL
vs
FUSILLIER

Porter, J. delivered the opinion of the court.

This action is brought to recover the last instalment of the price of certain slaves, which the defendant purchased of the plaintiff. There was judgment against the former, in the court below, and he has appealed.

The sale was made at *one, two, and three years' credit*, with a further stipulation, that in case the purchaser choose, he might postpone the payment of the whole price for two years after the last instalment, on paying interest at eight per centum per annum on the amount of each instalment as it became due. There is no evidence on record in respect to the first two instalments; and the appellant contends that, in the absence of all proof relating to them, this action should be considered premature, and must be dismissed; for that if he paid the interest on them, or if he has discharged the principal, he has a right to demand an extension of credit on the last instalment for two years, on paying *interest* at eight per centum.

We are, however, of opinion that if the defendant intended to rely on the performance of certain acts on his part, which would authorize him to claim an extension of the credit, that it was his duty to establish those facts, and that the plaintiff is not required to shew a nonperformance. The pleadings in this case do not in any manner authorize a different conclusion. The allegation in the petition, that the interest was not paid, is a negative assertion, which, according to the familiar rules of evidence, throws the proof on the adversary.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

When a stipulation is made, prolonging payment, on condition that the debtor pays interest annually, the latter must shew a performance of the condition on his part, to entitle him to its benefit.

If the defendant relies on the performance of certain conditions which entitle him to an extension of credit, he must shew by proof a performance—the plaintiff is not required to shew a nonperformance.

Western District,
September 1831.

BOREL
vs.
FUSILLIER

BOREL vs. FUSILLIER.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

Where a stipulation is made in favor of a party, prolonging the time of payment, on condition that he pays interest annually; he must shew a performance of the condition on his part, to entitle him to its benefit: The plaintiff who sues need not prove a non-performance.

In a claim for a diminution on the price of certain slaves for redhibitory defects; where the testimony is contradictory and not clear, the judgment of the inferior court refusing the claim, will be affirmed.

This suit was instituted to recover of the defendant the two first instalments of the purchase money of seven slaves, sold by the plaintiff to the defendant for three thousand five hundred dollars, on the 28th February, 1828. There was a stipulation in the act of sale, for a prolongation of time, on paying interest, which was invoked on the part of the defendant and which was refused, as not having been complied with on his part. [See the statement in the preceding case for this stipulation.]

The defendant set up a further defence by claiming a diminution of \$600 on the whole amount of the price of the slaves, on account of a redhibitory vice or malady in one of them, a woman, who is alleged to have been diseased at the time of the sale, with asthma and dropsey.

There was evidence to show the negro woman was considerably swelled before and at the time, and after the sale, and had difficulty in breathing. The doctor said it was the asthma.

Ursin Prevost deposed that the defendant told him he knew the wench, Mary-Ann, had the asthma at the time he bought her, and for that reason he gave only \$200 for her. Had she been sound witness thinks she would have been worth four or five hundred dollars.

The vendor warranted the negroes sold, "against all redhibitory vices and diseases whatever."

There was judgment against the plaintiff for 2066 dollars,

with eight per centum per annum interest from the time the two instalments became due, until paid.

The defendant's claim of diminution in price, &c., was rejected, as not having been established.

The defendant appealed.

Bowen for plaintiff.

Simon for defendant.

Porter, J. delivered the opinion of the court.

The plaintiff claims a sum of money from the defendant, due for slaves sold to him. There was judgment in the court of the first instance, in favor of the former, from which the latter has appealed.

One of the questions in the cause is settled by a decision made a few days since in this court between the same parties. The other relates to a claim set up for a deduction in the price, owing to redhibitory defects in the property purchased. The evidence on that head is contradictory; and we do not think it presents such a preponderance on the part of the appellant, as to authorize us to disturb the judgment of the inferior court.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

***MOORE (COLLINS' ADMR.) vs. LOUAILLIER & AL.**

APPEAL FROM THE COURT OF PROBATES OF THE PARISH OF ST. LANDRY.

A mortgage cannot be shown to exist by parol testimony. But the right to a mortgage, resulting from the transfer of a claim, to which a mortgage is attached, may be proved by parol evidence.

The law requires a notary to make a memorandum at the foot of a note

Western District,
September 1831.

BORREL
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FUSILLIER

The allegation that interest was not paid is a negative assertion, which according to the rules of evidence, throw the proof on the adversary.

When a stipulation is made in favor of a party, prolonging the time of payment, on condition that he pays interest annually; he must shew a performance of the condition on his part, to entitle him to its benefit: The plaintiff who sues need not prove a non-performance.

In a claim for a diminution on the price of certain slaves for redhibitory defects; where the testimony is contradictory and not clear, the judgment of the inferior court refusing the claim, will be affirmed.

21 572
49 855
49 878

*Note — This cause was argued at the September term, 1829, and suspended on a petition for a rehearing, which was granted at the September term 1830. At this term the cause was reargued. The court adhered to their former opinion, then delivered.

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given for the payment of a sum, secured by a mortgage; but it does not require him to certify the transfer of such note, or any one which is given on renewal of the original note.

The process verbal of sale of an estate, made by the judge of probates, subscribed by the purchaser and his sureties, which stipulates or secures a mortgage on the property sold, is considered of record in the parish judges office by being deposited and put on file in the office. It is thus deemed recorded, according to the requirements of law.

This case arose on the opposition of several creditors to the homologation of the tableau of distribution of the estate of M. Collins, deceased.

On the 20th of October, 1828, William Moore, administrator of M. Collins' estate, filed his tableau in the court of probates, and prayed for its homologation.

Joseph Andrus made opposition, on the ground that he was placed on the tableau as an ordinary creditor, when he should have been allowed the benefit of the vender's privilege on the proceeds of a tract of land, sold by Jesse Andrus to Collins in his life-time, and making part of his estate at his death, which was sold by his administrator.

The opponent claims as assignee, or endorsee, of his son Jesse Andrus. The latter, in October, 1818, sold to Collins a tract of land for \$4700, retaining a mortgage or privilege until payment. In July, 1821, Collins executed a new note to Jesse Andrus for \$1623, the balance then remaining due of the original purchase. In December, 1823, Jesse Andrus, by endorsement, transferred this note to his father, Joseph Andrus; and in February, 1829, during the pendency of this contest, Jesse Andrus executed to his father an act, under private signature, in which the new note for \$1623 was again transferred, and particularly described as being given for the balance due on the purchase of the tract of land which Collins had bought of Jesse Andrus; and that it was intended, in the transfer of the note, that the vender's privilege or mortgage on the land, or its proceeds, should go with it.

Joseph Andrus offered in evidence on the trial, the note

of Collins, which had been transferred, and the private act of Jesse Andrus, to him executed a few days before the trial, in February, 1829; and also parole evidence to shew that the note in question was the same which had been given for the purchase of the land by Collins. The evidence was objected to:

1st. The note did not correspond with the one mentioned in the act of sale of the land.

2d. It would be allowing a mortgage to be made out by parole agreement, if parole evidence was received to connect the note with the act of sale and mortgage.

3d. The act of Jesse Andrus would be allowing the party to make testimony for himself, if admitted; and also permitting the *descendant* of the opposing creditor to give evidence for him, which is prohibited.

The probate judge decided in favour of the mortgage.—The administrator appealed.

Louaillier, friere, claimed to be a privileged creditor, which was denied him by the administrator.

He claimed to be a privileged creditor, as the assignee of a note for \$1479 68, given by Collins for the purchase of four slaves at the sale of the community property between John Andrus and his late wife. This sale was made at the request of John Andrus, by the parish judge, in his capacity of auctioneer. A mortgage was retained in the *proces verbal* of sale on all the immoveable property and slaves; and it was expressed in it that the sale was made *judicially*.

The *proces verbal* of this sale was made up into a manuscript book, the leaves sewed together, and *filed* away in the parish judge's office. This was all the record ever made of it, and it was the custom of the judge to *file* in his office all documents of this description, and which he considered as *of record*, in his office. The administrator contended that this was not a recording of the mortgage, within the meaning of the law. The judge of probates decided it was, and allowed the mortgage. The administrator appealed.

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ADM'R
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AL.

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Garland for the administrator and appellant.

1st. Parole testimony cannot be received, to prove the connexion between the note assigned by Jesse Andrus to the appellee, and the mortgage which, it is pretended, was retained on the land and assigned, to secure the payment of the note; because it would be, in effect, proving a mortgage by parole, which cannot be done.—*Civil Code*, p. 452, art. 5, 6. *La. Code*, art. 3272.

2d. The law points out the manner in which notes secured by a mortgage are to be connected with the act that secures their payment;—which is, by the notary who passes the act stating on the note, (or marking it *Ne varietur*,) that it is secured by a mortgage.—2 *Moreau's Dig.* 70, § 4.

3d. This testimony is inadmissible, because it is the statement of Jesse Andrus, the obligee and endorser of the note, and the son of Joseph Andrus, to whom it is transferred; and the acknowledgment of Collins, the insolvent debtor. The statements of Jesse Andrus cannot be received, he being the person in whose favour the stipulation is made, and the son of the endorser; nor the acknowledgements of Collins, in a contest between the creditors of his insolvent succession.—3 *Mar.* 256. 12 *do.* 157. 2 *Mar.* N. S. 603.

4th. The *proces-verbal* of the sale under which Louaillier, *frere*, claims to have a mortgage on the proceeds of Collins' estate for the price of four slaves, was not made by order of the court of probates, or by the judge acting in the capacity of judge of probates, but simply, as auctioneer, and at the request of John Andrus. No record was ever made of this *proces verbal* of sale, in which Louaillier's mortgage was retained. It consists of sheets of paper sewed together and filed away in the parish judge's office. The law requires it should be inscribed in a record book in the office of the parish judge, or recorder of mortgages in the parish where the property is situated, to have effect against third persons.—1 *Martin*, N. S. 384. *Civil Code*, p. 464, 6, art. 52, 63. *La. Code*, 3314, 3334. 2 *Moreau's Dig.* 285.

Bowen for the opposing creditors and appellees.

1st. Joseph Andrus has shewn the existence of the mortgaged debt and its transfer by endorsement and private act. Parole evidence is admissible to shew the written agreement did not include the whole contract, and will be received to supply its place.—2 *Starkie*, 1048.

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2d. If Jesse Andrus, the son, be not allowed to make evidence for his father, he can transfer his claims to him, and the writing and endorsement are necessarily evidence of such transfer.—9 *Touiller*, 263—4, no. 159, 160, 161, 162.

3d. The provisions of the Civil Code, and the statutes with regard to the recording of mortgages, simply direct that all instruments stipulating a mortgage, other than those executed in New-Orleans, shall be recorded in the office of the parish judge where the mortgage property is situated; but does not prescribe the manner of recording.—3 *Mor. Dig.* 188. 6 *Martin*, N. S. 120. 3 *Martin*, N. S. 348.

4th. Parish judges being thus left without explicit directions on the subject, have adopted a different manner of recording; some pursuing the English manner, of preserving the original enrolment as a record, by filing away the proces verbal of sales stipulating mortgages.

5th. A *record* is a memorial of a proceeding, or act of a court of record, entered in a roll of parchment; for the preservation of it.—*Co. Litt.* 117, C. 26, a. *Com. Dig.* title Record, letter A.

6th. An affidavit read and filed, becomes a *record* of the court.—2 *Wilson*, 371. A court of record is that where the acts and judicial proceedings are enrolled in parchment, which rolls are called the records of the court.—3 *Black.* 24, 292.

Martin, J. delivered the opinion of the court.

The administrator complains of the judgment of the court of probates sustaining the oppositions of Andrus, and Louallier to the tableau of distribution.

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Andrus, endorsee of a note given by the deceased, for the balance due on a former note, given to secure the price of a tract of land, complained he was placed on the tableau as a mere chirography creditor, while he was a privileged and hypothecary creditor on the proceeds of the sale of the land.

Louallier complained that he is placed as assignee of the claim of the price of certain slaves, bought by the deceased at a probate sale, as a chirography creditor, while he ought to be placed as a privileged or mortgage creditor therefor.

The claim of Andrus was resisted on the ground that as he was the endorsee, given for a balance due on a larger one, for the price of a tract of land, he could not avail himself of the privilege or mortgage which attached on the former note.

It is urged the note in the opposing creditor's possession, is not on its face connected with the act of sale, on which the privilege or mortgage arises, and cannot be shewn to be so, by parole evidence; to permit this being done, would be to give effect to a parole mortgage, contrary to the provisions of the *Louisiana Code*, art. 3272; and the notary ought to have made a memorandum at the foot of the note.—2 *Moreau's Dig.* 70, § 4.

A mortgage cannot be shewn to exist by parole testimony. But the right to a mortgage, resulting from the transfer of a claim, to which a mortgage is attached, may be proved by parole evidence.

The law requires a notary to make a memorandum at the foot of a note given for the payment of a sum, secured by a mortgage; but it does not require him to certify the transfer of such note, or any one which is given in renewal of the original note.

We think that, although it is certain that a conventional mortgage cannot be the result of a parole agreement, the right to the mortgage resulting from the transfer of the claim to which the mortgage is attached, may be proved by parole testimony.

The law requires the notary to make a memorandum at the foot of a note, given for the payment of a sum secured by a mortgage; but it does not require him to certify the transfer of such a note, or any which is given as a renewal of the former.

Louallier's pretensions were set aside on the ground that his mortgage was not registered in the office of the parish judge. The privilege or mortgage results from the process verbal of the estate of a deceased person, sold by

the judge of probates. The purchaser and his sureties subscribed that part of the proces verbal of sale, which relates to the slaves bought. This proces verbal is on file, and consequently is a record of the court of probates. The parish judge is *ex officio* judge of probates and notary public. He is not expected to keep distinct offices, as parish judge, judge of probates, and notary public. Were he to keep distinct offices in such capacities, he would be the keeper of these several offices, they would be severally his offices. Whether he keep one or more offices, he is the keeper of all the papers in the one, or all of them. Hence, in the case of *Martel et al. vs. Tureaud's heirs*, (6 *Martin*, N. S. 121.) we held that any deed passed before a parish judge, in his notarial capacity, relating to property situated in his parish, does not require any transcription, or further inscription, to give it effect against third parties. Our decision must be the same with regard to an act of sale, received by him as judge of probates.

We think the court of probates did not err, in sustaining the opposition of the appellees.

It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates be affirmed, with costs.

TRIMBLE vs. MOORE.

**APPEAL FROM THE COURT OF THE FIFTH DISTRICT,
THE JUDGE OF THE DISTRICT PRESIDING.**

In actions of slander and defamation of character it is sufficient to sustain the action, to prove in substance the words charged to have been spoken.

In cases of this kind, slanderous words spoken, are not to be construed in a technical manner, but taken in their popular sense, and considered in relation to the idea they were intended, and might convey to the by-standers, or company to whom they were addressed.

Interest will not be allowed on a verdict finding a specified sum in damages. And if the judgment gives interest, even from the signing it, it will be reversed.

This is an action of slander, for slanderous words spoken of and concerning the plaintiff, by the defendant.

Western District,
September 1881.

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AL

The proces verbal of sale of an estate, made by the judge of probates, subscribed by the purchaser and his sureties, which stipulates or secures a mortgage on the property sold, is considered of record in the parish judges office by being deposited and put on file in the office. It is thus deemed recorded, according to the requirements of law.

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vs.
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The petition sets out, that the plaintiff is a good and honest citizen of his parish; that the defendant maliciously and falsely charged him, in the presence of many persons, of having "stolen three hundred dollars in money and notes, and had runaway;" and farther, that the plaintiff "had stolen three hundred dollars from him (the defendant) and runaway;" thereby meaning to charge the plaintiff, whilst acting as his (the defendant's) clerk with the crime of theft, &c. He lays his damages at three thousand dollars.

The defendant pleaded the general issue; and that he had only said the defendant "had taken notes and papers of his, without his consent, and deprived him of the power to collect moneys due him."

The evidence showed that Trimble had been in the employ of Moore as a clerk: they disagreed in settling their accounts, and Trimble on leaving took notes, accounts, and papers from Moore to collect and secure himself to the amount of his claims. When Moore heard of it he, in a passion, said "Trimble had taken from his store the amount of two or three hundred dollars in money, notes and papers, and had runaway with them;" "and damn him he would catch him and fetch him back."

There was a verdict for the plaintiff of five hundred and fifty-five dollars in damages, and judgment thereon allowing judicial interest from its date.

The defendant appealed.

Garland for plaintiff contended that the case was completely made out by the evidence, and urged the affirmance of the judgment.

Bowen for defendant. The evidence does not support the charge as laid in the petition, and the slanderous words are not proved as alleged to have been spoken.—*Rex vs. Horn, 2d Coup. 2 Russ. on Cr. 1036.*

2. There is no interest claimed or found by the jury: the judgment allowing it is erroneous.

Brownson, on the same side, commented on the case of

Freeland vs. Lanfear, 2 *Martin*, N. S., 257, and argued to show that not even the substance of the charge was proved, &c.

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Porter. J. delivered the opinion of the court.

This is an action of defamation. There was judgment in the court of the first instance for the plaintiff, and the defendant appealed.

The petition alleges, that the defendant "in substance charged the plaintiff with having stolen three hundred dollars in money and notes, and having runaway." The words proved on the trial were, "that the plaintiff had taken from defendants store to the amount of two or three hundred dollars in money and notes, and had runaway with them," the defendant adding, "damn him he would catch him and bring him back."

It seems conceded by the counsel on each side, and so indeed is the law, that it is sufficient in cases of this description, to prove in substance the words charged to be spoken, and the argument has turned principally on the compliance or non-compliance of the plaintiff in this case with the rule. A good deal of ingenuity has been exercised to shew that the words spoken did not import a charge of felony, but of trespass. We need not enquire whether the expressions used amount to a technical definition of the offence, and whether if put in an indictment they would not fail in legal precision. We must consider the words in their popular sense, and examine what idea they were intended to convey, and might convey to the by-standers to whom they were addressed. Considered in this point of view, we are of opinion that the defendant intended an accusation of theft, and that the words used conveyed such an idea. He charged the plaintiff with having taken his property. Had he stopped there, it might perhaps have amounted to nothing more than an accusation of trespass, but coupled with the assertion that he had runaway with it, and that he the defendant would catch him and

In actions of slander and defamation of character it is sufficient to sustain the action, to prove in substance the words charged to have been spoken.

In cases of this kind, slanderous words spoken, are not to be construed in a technical manner, but taken in their popular sense and considered in relation to the idea they were intended, and might convey to the by-standers, or company to whom they were addressed.

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September 1881

TRIMBLE
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MOORE

bring him and back—a higher offence is imputed. For if these allegations had been true—if the plaintiff had taken the property—if he had runaway with it—and if the defendant had been compelled to follow him to get it back, there would have been sufficient to place the plaintiff, to say the least of it, in a very delicate position before a jury on a prosecution for larceny.

One of the witnesses who testified to the declarations of the defendant, states that the impression produced by them on his mind was, that the plaintiff had taken the property without permission, and that he could not stay longer at the witnesses house unless he cleared his character. This understanding of a person who heard the conversation has been much relied on, to shew that those to whom the observations were addressed, did not consider the defendant to make an accusation of larceny. We do not know whether the witness believed a taking without permission to be a theft or not—he leaves it doubtful, by declaring he considered the accusation so serious, that without a proper explanation of the plaintiff's conduct he must remove from witnesses house.

But supposing this witness did so understand the words, the other by-standers may have affixed a different meaning to them: and the right of the plaintiff to obtain compensation for a charge of a very serious nature, should not be impaired because some may have understood it in a milder sense than that which the language used most certainly conveyed.

The court below gave interest on the amount of damages found by the jury, and there is error in this, for which the judgment must be reversed.

'Interest will not be allowed on a verdict finding a specified sum in damages. And if the judgment gives interest, even from the signing it, it will be reversed.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed. And it is further ordered, adjudged, and decreed that the plaintiff do recover of the defendant the sum of five hundred and fifty-five dollars, with costs in the court of the first instance; those of appeal to be paid by the plaintiff and appellee.

MARKHAM vs. CLOSE.APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE
JUDGE THEREOF PRESIDING.

The infliction of cruel punishment, on the slave by his master, is a criminal offence which must be punished by a criminal prosecution, and not in a civil action.

Maiming, mutilating, or cruel or inhuman treatment of a slave, is a public offence, and must be prosecuted criminally; and after conviction, the fine and other penalties for such conduct, are to be levied on the offender by the court before whom the conviction takes place.

The Civil Code treats, alone, of private rights of individuals, and the various interests growing out of property; but it may, in the mean time, provide in what cases a breach of the penal laws, brings with it a *forfeiture of private rights*.

This is an anomalous action, instituted in a *civil* form, to punish a *criminal* offence.

D. K. Markham, without alleging any title to the slave, or having any individual interest in the cause, appears as public prosecutor; and on the 17th of June, 1830, presented his petition to the district judge at chambers, alleging that the defendant had cruelly beat and maltreated one of his slaves, named Augustin, and prayed that the said slave be taken out of his master's possession and sold, and placed out of his reach and power; the proceeds of sale, after paying such *fine* as might be adjudged, and the costs of this suit, to be returned to the master.

The defendant appeared before the judge at chambers, and after being heard by his counsel, the judge ordered the cause to be docketed, and tried as a civil case.

At the November term 1830, the defendant's counsel filed peremptory exceptions to the form of action, alleging that it was unknown to the law, and that all the proceedings are null and void. The exceptions were overruled, and an answer put in on the merits. A bill of exceptions to the decision was taken.

The answer alleges that the slave Augustin is a runaway, and that when he received the chastisement complained of, he had just been brought back from the Mississippi, after ab-

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scolding for a considerable time. That he had him whipped with a whip in the manner he was authorized to do by law.

Parole testimony of several witnesses who saw the negro shortly after he had been flogged, was received. He was severely whipped, and his back and hips very much cut and skinned. The weather being warm, the wounds smelled badly; the negro was obliged to lie on his belly, being unable to sit or lie in any other position.

P. Negat, a neighbor of the defendant, says he flogged the negro, by order of the master, when first landed. At first he gave him twenty-five or thirty lashes, with a whip. That on the way to his master's he became sullen, and refused to go, when he gave him ten or twelve lashes more over the shoulders. The master came, and the negro still refusing to go with either of them, the master had him whipped again. The negro is disobedient, and a runaway. He says he knows the defendant, and that he is not a cruel or severe master.

The jury simply found a verdict for the plaintiff. The defendant then moved for a new trial: first, on the ground that the verdict is contrary to law and evidence; secondly, that it does not find any thing in fact for the plaintiff, or grant any thing prayed for in the petition. The new trial was refused.

There was judgment on the verdict, decreeing the slave to be sold, and placed out of the power of his master, who is convicted of having cruelly beat and maltreated him; and the balance of the proceeds of the sale, after paying the costs of the prosecution, be paid over to the defendant. He, the said defendant, not being allowed to purchase the slave, having refused on the trial to purge himself, on oath, of the charge of cruel treatment of said slave. The defendant appealed.

The prosecution is founded on the 192d article of the *Louisiana Code*, and a clause in the *Black Code*, 1 *Moreau's Dig.* 118, § 17.

Lewis and *Markham* for plaintiff.

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The question in this case is, whether a slave can be taken from his master or owner, for cruel and inhuman treatment, by a *criminal* or *civil* process? We think it may be done by the latter.

1st. It is expressly provided by the Civil Code, that the master or owner of a slave shall not chastise him with *unusual rigour*, or maim or mutilate him so as to expose his life, or cause his death.—*La. Code*, 173.

2d. When the master is guilty of cruel treatment towards his slave; the judge shall, besides inflicting a penalty, cause the slave to be sold, and placed out of the power of his master.—*La. Code*, art. 193.

3d. The law provides that when slaves are cruelly treated by not providing food, clothing, and lodging, complaints may be made to a justice of the peace in favor of the slave, for redress. And in case of beating or maiming slaves, the master and owner may be fined, and made to pay a penalty, if found guilty.—1 *Moreau's Digest*, 111, § 39. *Ibid*, 118, § 16, 17.

Garland and *Linton* for defendant:

It will be seen from the evidence, that the chastisement inflicted by the defendant on his slave, was with one of the weapons excepted by law: and that portion of the *Black Code*, and the 192d article of the *Louisiana Code*, relied on by the plaintiff, contemplates a *conviction* before a forfeiture.

2d. The law of forfeiture had its origin in the feudal system, and was intended to enlarge the prerogatives and resources of the crown. But it is now different, and in this country no man can be deprived of his property without his consent; nor can a forfeiture take place before conviction of the offence by a criminal proceeding.—2 *Bac. Abr.* 577, 582, 679. 4 *Black. Com.* 432.

3d. The *Black Code* fixes the penalty of cruel treatment to a slave, which can only be enforced by a criminal proceeding; and as the defendant has never been convicted of

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cruel treatment, his slave cannot be taken from him and sold.
1 *Mareau's Dig.* 118, § 16. *La. Code*, art. 192. *Old Civil Code*, p. 34, art. 27.

Porter, J. delivered the opinion of the court.

This action was commenced by the plaintiff, to compel the defendant to dispose of one of his slaves. The petition charges him with having beat, and cruelly treated the slave, and with a gross abuse of the power which the law has conferred on the master.

There were several exceptions pleaded to the petition, and on being overruled, an answer on the merits was put in. The cause was submitted to a jury, who found a verdict for the plaintiff. On this verdict the court directed the slave to be sold, the proceeds to be first applied to the costs of this suit, and the balance to be paid to the defendant.

The defendant has appealed. The record brings before us the evidence on which the jury rendered the verdict, and that evidence seems to fully support the conclusion to which they came. It is greatly to be deplored, that owners of slaves should abuse their authority, and violate the duties of humanity. But the punishment which the law has provided for their misconduct, can only reach them in the mode, and through those forms of proceeding, which that law has prescribed.

One of the exceptions which the judge *a quo* overruled, was, that the plaintiff had no right to institute any suit or proceeding against the defendant, and that the court had no jurisdiction of the case. We think this objection was correctly made, and that it should have been sustained.

We come to this conclusion from the language of the statutory provisions on this subject; their obvious meaning; and the considerations of public policy, which we cannot suppose to have been disregarded by the legislature, when they acted on a matter of so much importance to the peace and safety of society.

The 16th section of the *Black Code* provides that, "if any person whatever shall wilfully kill his slave, or the slave of another person, the said person being convicted thereof shall be tried and condemned agreeably to the laws of the territory; and in case any person or persons should inflict any cruel punishment, except flogging, or striking with a whip, leather thong, switch or small stick, or putting in irons, or confining such slave, the said person shall forfeit and pay for every offence, a fine not exceeding \$500, and not less than \$200."

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The infliction of cruel punishment, on the slave by his master, is a criminal offence which must be punished by a criminal prosecution, and not in a civil action.

The 21st section of the same code declares that, the fines not exceeding twenty-five dollars, which are ordered by the act, shall be recovered before a justice of the peace, and those which are above twenty-five dollars, shall be recovered before a competent tribunal.

The 16th section, already referred to, provides for the wilful killing of a slave, and directs the trial for such offence to be according to the laws of the (then) territory. There can be no doubt this killing is regarded as a criminal offence, and that the trial here spoken of is the same as that which takes place when any other crime is committed.

In the same section, and immediately following the provisions in relation to killing, the law treats of offences against the person of a slave *less* than killing, and punishes them by fine. No good reason suggests itself to us why mutilating a slave, should not also be regarded as an offence which amounts to a crime, and punished as such. The circumstance of a pecuniary penalty being alone inflicted for the injury, by no means deprives it of the character just given to it. That has to be ascertained by the inquiry, whether it affects the peace and good order of society. The law already cited considers it a public offence to kill a slave; and, maiming and mutilating one, should fall under the same denomination. The penalty is given to the state by the same language which provides for fine in regard to all other crimes:

Maiming, mutilating, or cruel or inhuman treatment of a slave, is a public offence, and must be prosecuted criminally; and after conviction, the fine and other penalties for such conduct, are to be levied on the offender by the court before whom the conviction takes place.

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no other mode of enforcing it is pointed out different from that given for the penalties affixed to offences against the property or person of the free citizen. We conclude, therefore, that it should be prosecuted in the same way these offences are, and by the same officer.

The article in the Code on which the present action is brought, strengthens the construction we put on this statute, and shews, at the same time, the error committed in addressing this complaint to the judge, in the exercise of his civil jurisdiction. It is in these words: "No master shall be compelled to sell his slave but in one of two cases, to-wit: The first, when being only coproprietor of the slave, his coproprietor demands the sale, in order to make partition of the property: the second, when the master shall be convicted of cruel treatment of his slave, and the judge shall deem proper to pronounce, *besides the penalty established for such cases*, that the slave shall be sold," &c.—*La. Code*, art. 192.

The conviction here spoken of which must precede the order to sell, we think, evidently means condemnation, or a criminal prosecution. The term cannot be correctly applied to a judgment pronounced in a civil case; and we are not, at this moment, aware of any instance in which the legislature have so used it. Admitting that, from inadvertence, it might be so employed in relation to a civil suit, the *subsequent* clause of the statute takes away all pretence from so interpreting it in this instance; for it connects the direction to sell the slave, with the same decree which inflicts the other penalty provided by law, namely, fine; cumulates the two punishments in the same prosecution; and clearly contemplates that the order to sell, is to be made in those proceedings which the state may institute, to enforce the pecuniary penalty, and *only as a consequence* of the master being convicted of an offence which exposes him to that penalty.

The civil code treats, alone, of private rights of individuals, and the various interests growing out of property; but it

It was argued that the *Louisiana Code* only treats of civil rights and obligations, and that it cannot be presumed, when it speaks of penalties and forfeitures, to have reference to

the criminal law. It is true, our Code professes to regulate property, and the various interests which men may acquire in it; but in doing so, it is neither out of the scope or object of such a work, to provide in what cases a breach of the penal law may bring with it a forfeiture of private rights. Thus we find in the Code, that tutors cannot be taken from those persons on whom the penal law has inflicted disabilities, and that the child may be disinherited who has committed a crime, or accused the parent of one.—*La. Code*, 322, 1613. The case is so clear a one, that we are not under the necessity of resorting to the obvious considerations of policy which, we must suppose, would have prevented the legislature from intrusting so delicate a matter to the interference of any, and every individual in society. Every consideration which induces the state to take the prosecution of offences against her peace and her dignity into her own hands, and forbids the interference of private passions with the vindication of her justice, most emphatically applies in cases as that before us. The individual who interfered in this instance may, we believe was, actuated by feelings which we cannot but respect. But what in this instance was the suggestion of humanity, might, in the next, be the promptings of envy, malice, and all uncharitableness.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed. And it is further ordered, that the cause be dismissed, the petitioner paying costs in both courts.

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may, in the mean
time, provide in
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private rights

ANDRUS ET AL. vs. HARMAN ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE
JUDGE OF THE SEVENTH PRESIDING.

An action cannot be sustained, to set aside a former judgment of the same court, unappealed from and unreversed. It forms *res judicata* between the parties.

A suit to recover damages against intervenors or third parties in a former suit, and who obtained judgment and dismissed the plaintiff's attachment

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The supreme court cannot examine a judgment of the district court unless brought before it by an appeal in the case itself, or when an action of nullity is properly brought and carried up.

This suit is commenced to compel the defendants to pay damages for intervening in a former suit, and procuring the dissolution of an attachment sued out, and the *alleged illegal* dismissal of the plaintiff's suit.

The petitioners allege they commenced a suit against one James McClelland, in March, 1829, to recover a note of \$190 given for a partnership debt, in the purchase of cattle.

When the suit was called for trial, at the November term of 1830, the defendants, being judgment creditors of McClelland intervened, and procured the dismissal of the attachment and suit, and had judgment for the property in contest.

The present suit was instituted in May 1831, alleging that the former suit was illegally dismissed, by which they lost the amount of the property attached. They claim damages of the defendants for these proceedings and the costs of the former suit, and pray to have the attachment reinstated, and the money received by the defendants refunded, &c.

There was no appeal from the judgment of the district court dismissing the former suit and attachment. The defendants filed peremptory exceptions to the plaintiffs form of action.

The present suit was also dismissed, as going to set aside the judgment of a former court, which stands unreversed and unappealed from.

The plaintiffs appealed.

Linton, for plaintiffs and appellants, contended that inasmuch as the intervenors had shewn on the pleadings no interest; had set up no right of property equal or superior to the seizing creditor in the original attachment suit, the court below was wrong in dismissing it: That the strongest proof

was required on the part of the debtor himself, to justify the court, at his instance, in dissolving an attachment—a *fortiori*, when third persons who changed the issue between the original parties demanded it.

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2. The court can inquire into the validity and regularity of a former judgment, collaterally and unappealed from when it is apparent that enormous injustice has been done to a seizing creditor, by illegal proceedings on the part of third persons not parties, originally to the suit.—*Code of Practice*, art. 389 to 394. 12 Mar. 533. 5 Mar. N. S. 499. 8 Mar. do. 513—519.

The judges declared from the bench such an action as this could not be maintained. They refused to hear argument on the other side.

Porter, J. delivered the opinion of the court.

The petitioners state, that they commenced an action by attachment against one McClelland, who was their debtor, and were proceeding to obtain final judgment against him, when the defendants intervened in the suit, and by their intervention procured a judgment of the district court, which illegally set aside the attachment, and dismissed the petitioners action.

The petition charges this intervention to be illegal and improper—that the judgment of the court was erroneous—that the petitioners had a just cause of action—that they filed exceptions to the petition in intervention, which the court disregarded—and that in consequence of these illegal proceedings, they have suffered damage to the amount of five hundred dollars.

It concludes with a prayer, that the attachment suit against M'Clelland may be reinstated, and that the defendants may pay the damages already stated.

To this petition the defendants put in the plea of *res judicata*, which the court below sustained, and the petitioners appealed.

An action cannot be sustained to set aside a former judgment of the same court, unappealed from, and unreversed. It

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forms *res judicata*
between the parties.

A suit to recover damages against intervenors or third parties in a former suit, and who obtained judgment and dismissed the plaintiff's attachment suit, is *wholly untenable*, while such judgment stands unreversed and unappealed from.

The supreme court cannot examine a judgment of the district court unless brought before it, by an appeal in the case itself, or when an action of nullity is properly brought, and carried up.

The court did not err in doing so. The action is of a very novel character, and wholly untenable. It is an attempt to recover damages from the defendants for being parties to a suit in which judgment was rendered against the plaintiffs, and that without any allegation of fraud on their part. This cannot be done. To enable us to give judgment for the plaintiffs, we must examine the correctness of the decree in the other suit, and while it stands unreversed, we have no authority to do so. As we said in the case of *Dufour vs. Camfranc*, the validity of a sentence rendered by a court of competent jurisdiction cannot be enquired into collaterally. It is as a plea, a bar, or evidence, conclusive between the parties. The errors which it may contain, were questions for the decision of the court which tried the cause, and we have no power to examine how they were decided, unless regularly brought before us by appeal; or by an action of nullity in those cases where the law affords such remedy.—
11 *Martin*, 608.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

**BRASSEUR, WIFE OF FRA'S RICHARD vs. HER HUSBAND
ET AL.**

APPEAL FROM THE COURT OF THE FIFTH DISTRICT.

THE JUDGE OF THE DISTRICT PRESIDING.

The plaintiff or party who succeeds in a suit, has a right to recover his costs, from those against whom he obtains judgment.

But where there are two sets of defendants or parties, having distinct interests, as far as the judgment operates in each distinct interest or party, each one must pay his proper proportion of the costs accruing in his controversy with the plaintiff.

The petitioner alleges she was married to one François Richard in 1823, and in 1824 Louis Richard obtained judgment against her husband for a sum of money, and in 1826, finding her husband much embarrassed, she obtained final judgment of separation of property, for the sum of \$1884 77.

the amount she brought into marriage; that before her judgment was satisfied, the heirs of Louis Richard, now deceased, had issued execution against her husband, and seized his property, to satisfy the judgment of their deceased father. She obtained an injunction against the plaintiffs in execution and *her husband*, and applied the property seized to the payment of her judgment. The district court, in giving judgment in her favour on the injunction, refused to allow her the costs of the injunction suit against the defendants, whose execution was enjoined, because they were induced by a common error between the parties, to levy on the property enjoined. Judgment for costs was only given against the husband, who was insolvent.

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The plaintiff alleged she ought to have judgment for her costs against all the defendants, and on refusal, she appealed.

Garland for plaintiff:

1st. Costs are accessory to the judgment, and must be paid by the party cast in the suit.—*Code of Practice*, art. 549, 550, 551, 552. 11 Mar. 577. 10 do 115. 2 Mar. 307.

2d. The costs belong to the plaintiff, when there is judgment in his favor.—*Code of Practice*, 548.

Lewis for defendants:

The plaintiff committed an error by receiving judgment against her husband for more than was due to her. The defendants acted in good faith, and the error (if any) committed by them in their seizure of the husband's property, was caused by the fault of the plaintiff and her husband; and as the latter was the real debtor, he should pay all costs, and the plaintiff is bound to look to him.

2d. Costs are to be paid by the party cast in the suit: and as the plaintiff's injunction against the defendants, except François Richard, was only partially sustained—the plaintiff, too, having errors to correct on her part—it is but justice, and the law, that she should look to the defendant, François Richard, alone, for her costs.—*Code of Practice*, art. 549.

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Porter, J. delivered the opinion of the court.

In this action the husband of the plaintiff, and other persons who had recovered a judgment against him, were made defendants, and the suit was instituted and prosecuted with a twofold object, one was to correct certain errors in a judgment which the plaintiff had obtained against her husband, and the other was to prevent the codefendants, who had issued execution against her, from enforcing that execution on property which the petitioner alleged had been set apart and delivered to her, in virtue of the judgment of separation.

The court below rendered a judgment, on the merits of which neither party complains, but the plaintiffs and appellants aver, there is error in it as relates to the costs. The court considering the plaintiffs in execution against the husband, to have been led into error by his conduct, decreed that he should pay all the costs. In this we think it erred. As between them and him the equity of such a direction may be admitted, but as between the plaintiff and the other parties, it is by no means so obvious. It may be true; indeed there is evidence on record of the fact, that the husband is insolvent; and the consequence of giving judgment against him for the whole costs, will be, that if he should be unable to pay them, the burthen of them will fall on the plaintiff. She has a right to recover her costs from those against whom she obtained judgment.

The plaintiff or party who succeeds in a suit, has a right to recover his costs from those against whom he obtains judgment.

The language of the *Code of Practice* is express on this point, and if any case would authorize an exception to the rule, we do not think this case to be such a one.—*Code of Practice*, art. 549.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed: and, proceeding to give such judgment here, as in our opinion should have been given below, it is ordered, adjudged, and decreed, that the act of sale mentioned in the pleadings, from the defendant, François Richard, to the plaintiff, be confirmed; that she take the property there

mentioned, in full satisfaction of the amount stated to be due in the said act of sale; that she also recover from the defendant, her husband, the sum of thirty-nine dollars and seventy-three cents, with legal interest thereon, at the rate of five per centum per annum, from the day of the signing the judgment in the district court, until paid. And it is further ordered, that the injunction sued out in this case be dissolved, except so far as regards any of the property mentioned and conveyed in the said act of sale, and as to that, it be perpetuated. And this court, proceeding to determine the liability of the parties as to the payment of the costs of the suit, order and decree that the defendant, François Richard, pay so much of the costs as have accrued in the controversy between him and the plaintiff for correcting the errors complained of; and the defendants in the injunction pay all the cost thereof: the costs of this appeal to be paid by the appellees.

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But where there are two sets of defendants or parties having distinct interests, as far as the judgment operates in each distinct interest or party, each one must pay his proper proportion of the costs accruing in his controversy with the plaintiff.

MUGGAH vs. GREIG.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT,
THE JUDGE OF THE DISTRICT PRESIDING.

Where a slave is claimed and held as having been purchased for the defendant and with his funds, but the title is taken in the name of the person making the purchase, parol testimony is *inadmissible*, to prove that the purchaser acted as the agent of the defendant, and bought the slave with his funds.

Written evidence must be produced to prove the *agency* of another, in making a contract of sale or purchase or transfer of immoveables or slaves, which is required by law to be in writing.

So where a person buys a slave and takes the title in his own name, and another person claiming him as having been purchased for him and with his funds, he must show a written authority to purchase, in order to hold or recover the slave.

This suit is brought by the plaintiff as heir of John Muggah, to recover from the defendant a negro boy, which is alleged to have been purchased by John Muggah in New

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Orleans, who took the act of sale in his own name and right. The defendant took possession of the boy and holds him on the ground that Muggah purchased the negro with the defendant's money. The petition prayed that the boy be delivered up; or in lieu thereof, that the defendant be decreed to pay eight hundred dollars, the value of him.

The defendant alleged that John Muggah acted as his agent, and that he purchased the negro boy in New Orleans with his (defendant's) funds. That on his return he delivered possession of the boy to the defendant.

There was judgment decreeing the plaintiff the possession of the boy; but allowing the defendant 450 dollars, which appeared to have been advanced by him to John Muggah, in his life time, to purchase a negro for him.

Parole evidence was offered by the defendant to show that John Muggah the ancestor of the plaintiff, purchased the negro in question as his agent, and with his money; and also for establishing a title to the negro. The plaintiff's counsel objected to the testimony being received to establish a legal title in the defendant to the negro in contest; or any farther than to shew that the defendant advanced money to purchase a negro. The court sustained the objection, and a bill of exceptions was taken.

Bowen for plaintiff. The transfer and title to all immoveable property and slaves must be in writing—*La. Code*, 2255—and all extra judicial confessions are inadmissible in every case, where testimonial proof cannot be received.—*La. Code*, 2269.

2. It is admitted that by the Napoleon Code there exists an exception to this rule, when there is a commencement of proof in writing; but no such exception is contained in the Louisiana Code.—*Nap. Code*, art. 1347.

3. In all cases the supreme court have let in parole proof, after a commencement of proof in writing, when the subject matter of the action *did not* relate to the transfer of immoveable property or slaves.—9 *Mar.* 566—12 *do.* 350—3 *Mar. N. S.* 75.—4 *Mar. N. S.* 53.

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Simon and Brownson for defendants, contended that when a person voluntarily undertook to manage the affairs of another, he incurred all the obligations which results from an express agency, and is brought to complete it. The plaintiff's ancestor purchased this negro as the agent and with defendant's money, and he cannot now claim him.—*La. Code*, 2274, 2255, 1961.—*Pothier contrat du Mandat*, No. 58, 59.—9 *Toulliur*, 236, No. 140, 141.

2. Parole testimony is admissible to show that the plaintiff's ancestor acted as the agent of the defendant in purchasing the negro.—7 *Mar.* 243.

Mathews. J. delivered the opinion of the court.

This is a suit brought by the plaintiff in his own right, and as curator to Edward Muggah, an absentee, to recover from the defendant a slave (described in the petition) belonging to the succession of John Muggah, claiming as heirs to the latter. They obtained judgment for the recovery of the slave, in the court below, from which the defendant appealed.

The evidence of the case shews the legal title to have been vested in John Muggah, during his life-time; and it is not disputed that the plaintiffs are his heirs.

The defendant sets up title to the slave in dispute, as having been purchased for him, and with his funds, through the agency of the deceased Muggah; and that the title, though taken in the name of the latter, legally enured to his benefit. There is no legal evidence to shew that the appellant constituted John Muggah his attorney-in-fact, to purchase for him the identical slave claimed in the present suit, or any other slave; he relies wholly on testimonial proof to establish this fact, and possession of the property, in support of the title by him claimed.

Our law on the subject of conventional obligations, requires that "every transfer of immoveable property or slaves, must be made in writing;" and no testimonial proof of such sales or transfers can be received, in ordinary cases, except

Where a slave is held as having been purchased for the defendant and with his funds, but the title is taken in the name of the person making the purchase, parole testimony is inad-

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missible, to prove that the purchaser acted as the agent of the defendant, and bought the slave with his funds.

Written evidence must be produced to prove the agency of another in making a contract of sale or purchase or transfer of immoveables or slaves, which is required by law to be in writing.

So where a person buys a slave and takes the title in his own name, and another person claiming him as having been purchased for him and with his funds, he must shew a written authority to purchase in order to hold or recover the slave.

that which arises from the confession of the parties to the contract made, under oath, to interrogatories propounded for that purpose.—See *La. Code*, art. 2255 and 2415.

According to article 2961 of the Code, “a power of attorney may be given either by a public act, or by a writing under private signature,” &c. It may also be given verbally, but of this testimonial proof is admitted, only, conformably to the title of conventional obligations. In relation to contracts which may be proven by parole, the power granted to enter into them, may well be proven by the same kind of evidence which would suffice when the contract was made directly between the parties. But in the contract of sale, or other transfer of immoveables or slaves, required by law to be made in writing, and which the parties are not permitted to support by testimonial proof, written evidence ought to be produced, as being alone legally admissible to establish the authority by which an agency is assumed for either of the contracting parties.

The record of the present case affords no legal evidence to shew that Greig, the defendant, authorized John Muggah to purchase, for the former, the slave in question; and we are of opinion that the district court did not err, in coming to the conclusion, that the legal title to said slave was in the latter at the time of his death, and that it descended to the plaintiffs, who have a right now to recover the property.

That part of the decree which condemns the plaintiffs to refund the money which was proven to have been advanced by the defendant to their ancestor, is not complained of by the appellee.

This decision has the appearance of contravening the doctrine of mandate, as established in the case of *Hale vs. Sprigg*, reported in 7 *Martin*, 243. But the opinion of the court in that case, seems to be predicated on full proof of the power granted to the attorney, or on evidence of that fact not excepted to; whereas, in the present case, the whole evi-

dence in support of the appointment of the agent was objected to, and properly rejected.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

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*ROGERS ET AL vs. HENDSLEY ET AL.*

APPEAL FROM THE COURT OF THE FIFTH DISTRICT,  
THE JUDGE OF THE SEVENTH PRESIDING.

Where an attorney undertakes to collect a debt, and before doing so takes a new obligation *payable to himself*, and gives up the old one to the debtor, the debt thus evidenced by authentic act, made payable to the attorney, cannot be *seized for* and made *subject to his debts*, when it is in evidence the attorney did not intend to appropriate the debt of his principals to himself; and where they assented to the act of the agent and claimed the debt as their own.

Parole evidence is admissible to shew that an *act or obligation* taken for a debt by an agent, and made *payable to himself*, is the property and right of his principal, although it appears on the face of the instrument to be due to the agent.

If A receives money for the use of B, it cannot be attached as the property of A in his hands. The same rule applies to notes.

This suit commenced by injunction. The plaintiffs, about the beginning of the year 1829, put sundry notes, debts, and accounts into the hands of Luke Lesassier, an attorney at law, to collect, for their benefit and use. These claims had been transferred to the plaintiffs, to indemnify them on account of a suretyship to William and John Simons. Among the debts placed in Lesassier's hands for collection, was one on Jacob Bogard for \$250. It was evidenced by a note payable to William Simons. Bogard, to get further time, agreed with Lesassier, and executed a new obligation by authentic act, in which he acknowledged a mortgage on one hundred acres of land, and stipulated to pay the debt in two equal, annual instalments of \$125 each, in the months of March, 1830 and 1831. The new instrument was made payable to L. Lesassier, and bears date in March, 1829. Lesassier left the state for Texas, in the following November, without

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rendering any account of his agency. A new attorney and agent was appointed in the spring of 1830. The debt on Bogard was handed over, with the other claims, by the person having charge of Lesassier's papers, to the new agent, who found this debt evidenced by an act in the notary's office, and *payable to Lesassier alone*. Application was made to the debtor, who recognised and acknowledged the debt to be due, unpaid, and owing to the plaintiffs. That it was so understood between him and Lesassier, at the time of executing the new instrument. The new attorney was proceeding to collect the debt for the plaintiffs, after having made frequent demands of the debtor for nearly a year, when Eleanor Hendsley, a judgment creditor of Lesassier, levied her execution on it, and advertised it for sale as a *debt, right, and credit* of Lesassier. The plaintiffs on the 5th of May, 1831, obtained an injunction and arrested the sale.

The district court gave judgment perpetuating the injunction, and decreeing the debt to be the property of the plaintiff. The defendant Hendsley appealed.

Parole evidence was offered to shew the origin of the debt, that it was the same as evidenced by the new obligation, which was, in fact, taken for the benefit of the plaintiffs; that although made *payable to Lesassier*, he never claimed it as his own, or exercised any acts of ownership over it, but always acknowledged it to be the property of the plaintiffs. The testimony was objected to by the defendant Hendsley, and taken, subject to all legal objections.

It was in proof that Lesassier was associated with a partner in his profession, who resided here, and perfectly solvent and able to pay the debt.

*Curry for plaintiffs:*

Lesassier, the attorney and agent, exceeded his authority in taking the new obligation from the plaintiff's debtor, *payable to himself*, instead of his *principals*; and they are not bound by his acts done out of his authority.—8 John. 361.

7 *Martin*, N. S. 244. 2 *Martin*, N. S. 292. 1 *Martin* N. S. 444. Western District, September 1881.

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2d. The plaintiffs are no parties to the act between Lesasier and Bogard the debtor, and are consequently not bound by it. They have the right to shew by parole testimony that their agent exceeded his authority, and, also, their *right* to the debt which he has made payable to himself, and that he acknowledged it to belong to the plaintiffs.—11 *Martin*, 630. 7 *Martin*, N. S. 199. 7 *Martin*, 243. 1 *La. Rep.* 220.

*Garland*, for defendant Hendsley, relied on the following points:

1st. The attorney, by taking a new obligation in his own name, becomes responsible to the principal creditor; but he has a right to enforce payment in his own name, and his receipt will protect the debtor from paying it to the principal creditor.—5 *Martin*, N. S. 41. *La. Code*, art. 2139.

2d. An agent who surrenders a note of his principal, and takes a new obligation payable to himself, novates the debt, and by delaying to sue on it at maturity, becomes responsible for the amount.—4 *Martin*, N. S. 539. *Ibid*, 655.

*Porter, J.* delivered the opinion of the court.

The plaintiffs placed in the hands of two gentlemen of the bar, who were associated in professional business, a note, for collection. One of them extended the credit given on it, and took a new obligation in his own name. The defendants, who are creditors of this person, levied an execution on the debt which he had thus made payable to himself, and were about selling it. The plaintiffs prevented them from doing so by an injunction. The court, on hearing the parties, made the injunction perpetual, and the defendants appealed.

Where an attorney undertakes to collect a debt, and before doing so takes a new obligation payable to himself, and gives up the old one to the debtor, the debt thus evidenced by authentic act, made payable to the attorney, cannot be seized for and made subject to his debts, when it is in evidence the attor-

We do not feel compelled to examine whether, under a power to two, one can give a discharge; or whether, in the

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ney did not intend to appropriate the debt of his principals to himself, and where they assented to the act of the agent and claimed the debt as their own.

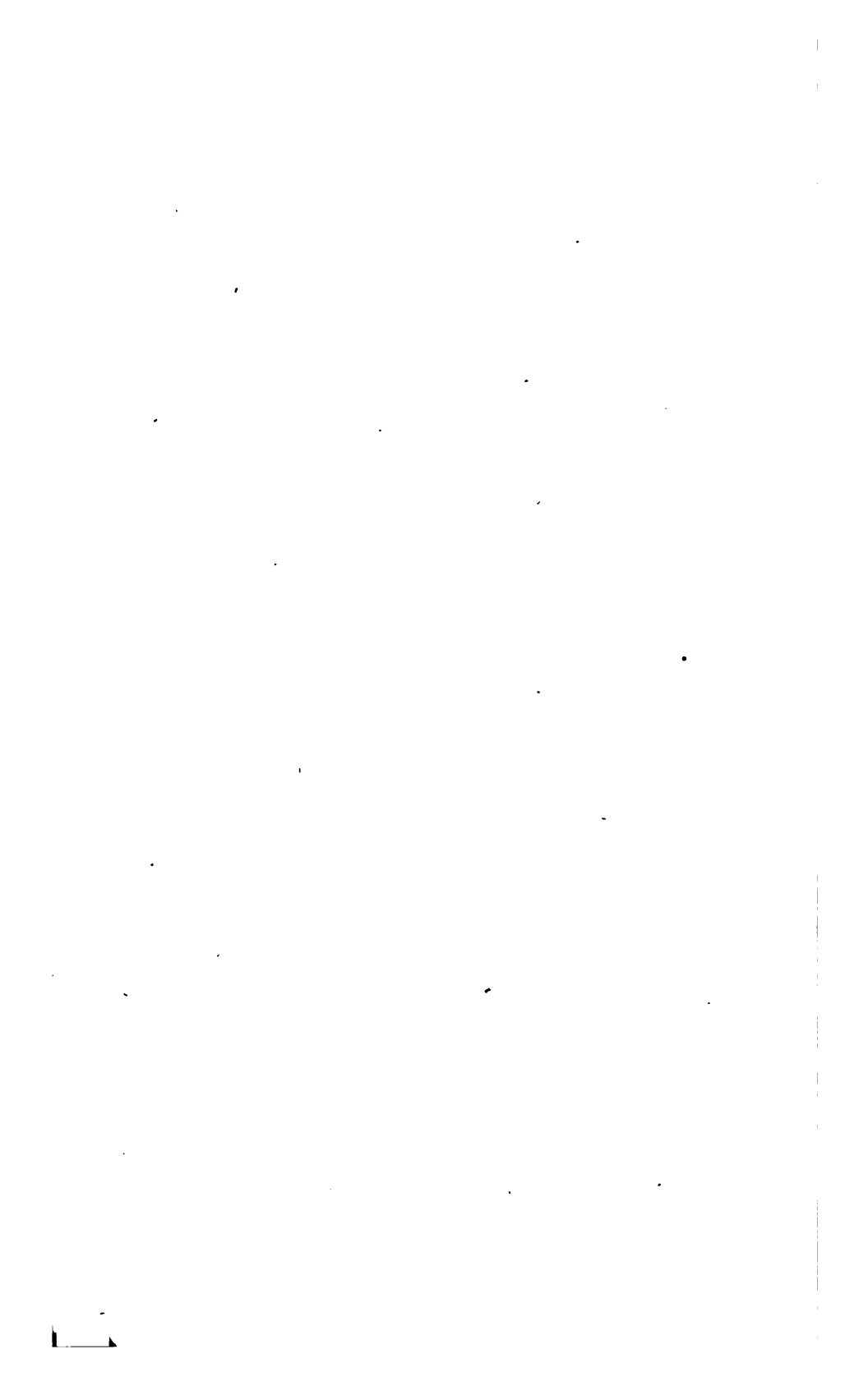
Parole evidence is admissible to shew that an act or obligation taken for a debt by an agent, and be made payable to himself, is the property and right of his principal, although it appears on the face of the instrument to be due to the agent.

If A receives money for the use of B it cannot be attached as the property of A in his hands. The same rule applies to notes.

hypothesis that he could, an authority was vested in him to novate the debt. Supposing him to possess such power, the evidence in this case clearly establishes that he did not contemplate taking the obligation in his own right, and for his own benefit: it is, on the contrary, proved that at the time he received the obligation, and afterwards, he declared that it was for the use and benefit of his principals. This transaction; which they might have disavowed, they have thought proper to approve; and there can be no doubt that, on their assenting to it, the obligation became theirs, and was not subject to the attorney's debts. We have already decided that if A receive money for the use of B, it cannot be attached as the property of A; and the same rule will, we think, apply where a note is taken. The circumstance of the obligation being in the name of the attorney, does not affect the legal principles which control the case: neither plaintiffs or defendants were parties to the act, and it was open to them to shew, by parole or other evidence, the real nature of the transaction.—4 *Martin's Reports*, N. S. 134.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.







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| <b>ABANDONMENT.</b>                                                                                                                                                                                                 |       |                                                                                                                                                                                                                                                                                                                                                                                                |            |
| 1. If on the vessel being seized the captain be thrown into prison, and on his being released makes immediate claim for her, and is threatened with death if he persist, he cannot be charged with negligence.      |       | 1. Where the bank undertakes the collection of a note, it becomes the agent of the depositor, and if the notary employed to protest the note for non payment, fails to give the legal notice of protest to the endorsees, in consequence of which they are exonerated, the bank is liable for the neglect, and bound to pay the amount of the note to the person depositing it for collection. |            |
| <i>Thompson vs Insurance Company</i>                                                                                                                                                                                | 228   | <i>Pritchard vs. State Bank,</i>                                                                                                                                                                                                                                                                                                                                                               | 415        |
| 2. If the difficulty of recovering the vessel be great, and the prospect of getting her into possession so as to pursue the voyage feeble, an abandonment may take place.                                           |       | 2. But where an agent becomes liable to pay the amount of a note, in consequence of the neglect to give legal notice of protest, he is entitled to have the note, with all the remaining rights of the creditor, transferred to him.                                                                                                                                                           | 415        |
|                                                                                                                                                                                                                     |       | <i>ib.</i>                                                                                                                                                                                                                                                                                                                                                                                     |            |
| <b>ABSCOND.</b>                                                                                                                                                                                                     |       |                                                                                                                                                                                                                                                                                                                                                                                                |            |
| 1. The general received opinion of the words <i>to abscond</i> , is the act of a person who leaves any particular place clandestinely, or of one who conceals or hides himself.                                     |       | 4. Where a principal constitutes another person his attorney-in-fact to sell a specific piece of property within a limited time, if a sale is made subsequently, without a prolongation of the time by the owner, it is null and void.                                                                                                                                                         |            |
| <i>Johnson vs Thompson</i>                                                                                                                                                                                          | 410   | <i>Livingston vs. Coiron,</i>                                                                                                                                                                                                                                                                                                                                                                  | 441        |
| <b>ADMINISTRATOR.</b>                                                                                                                                                                                               |       |                                                                                                                                                                                                                                                                                                                                                                                                |            |
| Letters of administration make full proof of the party's capacity, until they be revoked, they must have their effect, and the regularity of the proceedings on which they issued, cannot be examined collaterally. |       | 4. But if the principal writes to his attorney-in-fact just before the period of limitation expires, and states it to be his intention and will, that the sale be made at a period later than that specified in the original authority, a sale made subsequently to the time first specified, will be valid, and cannot be rescinded for want of authority in the agent to sell.               | <i>ib.</i> |
| <i>Rills vs. Questi,</i>                                                                                                                                                                                            | 249   |                                                                                                                                                                                                                                                                                                                                                                                                |            |
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| Unskilfulness in an agent is not excused by a contract in which it was stipulated he was to be governed by the directions of the principal.                                                                         |       | <b>AMENDMENTS.</b>                                                                                                                                                                                                                                                                                                                                                                             |            |
| <i>Nichols vs. Hanse et al.</i>                                                                                                                                                                                     | 382   | 1 Amendments are not matters of                                                                                                                                                                                                                                                                                                                                                                |            |

course, and cannot be made without leave of the court or consent of the party—if they be, they cannot be noticed.

*Trahan vs. McMannus* 209  
2. Although no answer be put in, a supplemental petition cannot be filed without leave. To supply the deficiencies of a petition is to amend, and no amendment can take place in the pleadings without the leave of the court or the consent of the adverse party.

*Baines vs. Higgins* 220  
3. Where an amendment to a petition contains matter of substance, and the cause is tried without an answer to it, it will be remanded for want of the *contestatio lites*.

*Allain vs. Preston* 391

### ATTACHMENT.

1. An attachment will lie against the incorporeal rights and credits of a debtor in the hands of garnishees, although it be sued out after transfer of such rights and credits to a third person, when no notice of such transfer had been previously given to the debtor.

*Cox vs. White* 422

2. The irregularities of such a proceeding by attachment which has progressed to final judgment, cannot be inquired into in a subsequent suit by a new plaintiff, to recover the property attached. The judgment in attachment forms *res judicata* between the parties, and cures all irregularities when not appealed from. *ib.*

3. An attaching creditor has a right to call for proof of the consideration of an assignment which is opposed to him.

*Mayor vs. Brown* 492

4. Where the proof of that consideration is incomplete he may avail himself of the defect. *ib.*

5. If A receives money for the use of B, it cannot be attached as the property of A in his hands. The same rule applies to notes.

*Rodgers vs. Hendley* 597

### ATTORNEY AT LAW.

1. The authority of the attorney is not restricted to the mere prosecution of the suit, but extends to every thing necessary for the protection of the interests intrusted to his care.

*Paxon vs. Cobb*, 187

2. If he dismiss the action it is within the scope of his authority, and the plaintiff is bound by his acts. *ib.*

3. Where an attorney undertakes to

collect a debt, and before doing so takes a new obligation payable to himself, and gives up the old one to the debtor, the debt thus evidenced by authentic act, made payable to the attorney, cannot be seized for and made subject to his debts, when it is in evidence the attorney did not intend to appropriate the debt of his principals to himself; and where they assented to the act of the agent and claimed the debt as their own.

*Rodgers vs. Hendley*, 597

### APPEAL.

1. The appeal bond must exceed by one half the amount of the whole judgment appealed from, to entitle the appellant to a suspensive appeal.

*Ross vs. Pargood*, 85

2. And by the article 574th of the Code of Practice the judge must in all cases, whether it be a suspensive appeal or merely a *devolutive* appeal, fix the amount of the appeal bond which is the legal sum. *ib.*

3. No appeal lies in behalf of universal legatees from a rule directing the executor to pay into the treasury the balance in his hands.

*Goslin's legatees vs. her heirs*, 141

4. The supreme court will not remand a cause when it appears that justice has been done.

*Balsineux vs. Bills*, 151

5. Where the record shows that the testimony was taken down by the clerk no objection can be made to the certificate of the judge that the record contains all the evidence adduced.

*Crawford vs. Jewell*, 262

6. When nothing to the contrary appears the judge is presumed to have given his certificate on the event occurring which authorized him to give it. *ib.*

7. If the record show that documents were produced, when nothing shows they were filed, there is no evidence of a diminution of the record. *ib.*

8. When the supreme court remands a cause on a single point, it remands it also for an inquiry into all the questions which grow out of the discussion on that point.

*Brastow vs. Ventris*, 172

9. If the appellant fail to bring up the record, and it be brought up by the clerk of the lower court and the appellee cited, he may pray for affirmation of the judgment.

*Barbarin vs. Armstrong* 206

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10. Without a statement of facts the supreme court cannot know what evidence was introduced, and are bound to presume until the contrary is shewn, that the judgment below was rendered under those circumstances, and with that evidence which made it correct and legal. *Flower vs Hagan et al*, 225
11. Where the case turns entirely upon a question of fact, the supreme court will not disturb the verdict of the jury. *Green vs. Turner* 254
12. When the appeal is taken for delay damages can only be awarded to the party in interest. *Adams vs. Dupy*, 259
13. In cases of conflicting testimony, the supreme court will place great reliance upon the conclusion of the court of the first instance. *Irion vs. Love* 261
14. After the appellant has had the cause set down for argument, the appellee cannot make a motion to dismiss it, *O'Donnell vs. Lobdell* 299
15. If the appellant does not comply with the condition upon which the appeal has been granted, by giving bond to prosecute the appeal, and suffers a year to elapse, the judgment becomes *res judicata*, and he cannot be relieved either by the district or supreme court. *Marigny vs. Stanley* 322
- 16 Where the judge *a quo* has made a statement of facts, it is not required to shew that any attempt was made to have one made between the parties: the supreme court will presume that the judge has done his duty and did not volunteer in making a statement till it was his duty to do so. *Bachemain vs his creditors*, 346
- 17 Where there is a statement of facts, the cause is examinable in every one of its parts without exception. *ib*
- 18 Where the verdict of the jury is not manifestly wrong, it will not be disturbed. *Passemont vs Norwood*, 389
- 19 If the damages assessed by a jury appear to be enormous and unsupported by the testimony, the judgment will be reversed. *Bourgirion vs Bourdousky*, 378
- 20 When the evidence is not conclusive it will be remanded to be submitted to another jury. *Chase vs Caldwell*, 396
- 21 In a case where no question of law is raised, the judgment of the court *a quo* will be confirmed, if it appear to be in conformity with the facts of the case. *Haiphien vs. Franklin's Curator*, 465
- 22 The supreme court will not proceed to the examination of a cause in which it

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- is not evident that the whole record is before them. *Sibley vs Field*, 491
- 23 The supreme court, whilst sitting in the eastern district, during the term prescribed by the constitution, will not transact business arising in the western. *Millaudon vs Lapice*, 511
- 24 The supreme court cannot examine a judgment of the district court unless brought before it by an appeal in the case itself, or when an action of nullity is properly brought and carried up. *Andretow vs. Harmon*, 587

### AVERMENTS.

If the plaintiff does not entitle himself to a privilege by proper averments on the record, it cannot be allowed to him. *S. Desier vs. Michaud* 271

### AVERAGE.

1. Every thing which is voluntarily sacrificed for the benefit of all concerned, is considered the subject of general, not particular average. *Tritzman vs. Clamageron* 195
2. Masts hanging over the side of a vessel, fall under the head of general average; but they only do so for the value they had at the time they were cut away. *ib*

### AUCTION.

1. By the English courts it was considered a breach of faith on the part of the vender, to employ bidders or puffers at auction. If the owner wished to prevent a sale under a certain price, he must proclaim the lowest bid he would take in putting up his goods. *Corryolis vs. Mossy* 504
2. The purchaser could avoid a sale at auction, made by the aid of puffers or private bidders, on the ground that his assent had been obtained by fraudulent practices on the part of the vender or his agent. *ib*
3. A purchase made at auction is similar to a private contract. In both assent is necessary in each party; and an offer to sell at auction, to the highest bidder, is not binding, unless the auctioneer assent to the bid that is made. *ib*
3. So where property is put up at auction and the plaintiff becomes the highest bidder, the auctioneer may reject his bid and withdraw the property unless he will bid a certain sum more. *ib*

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | PAGE. | PAGE.                                                                                                                                                                                                                                                                                                                       |
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| <b>BACK CONCESSIONS.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |       |                                                                                                                                                                                                                                                                                                                             |
| 1. Where a back concession is authorized to be located in the rear of the ancestor's plantation, and in the life-time of the latter, he and his son locate it in a more advantageous position; at the sale of the ancestor's succession the proces verbal of the sale purports to sell only the inchoate title or right to the concession, the son who purchased through an agent at sale, will be considered as having purchased the located tract which is most advantageous to him, and not the right to locate it in the rear of his ancestor's plantation. |       | the contract with an undertaker to build, but in the exercise of this right, the use of it must be considered as putting an end to the contract in all its parts and relations, and authorizes a valuation of the expense and labour incurred by the undertaker by other evidence than that of the written contract itself. |
| <i>Berard's heirs vs. Berard,</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |       | <i>Villalobos vs. Mooney</i> 321                                                                                                                                                                                                                                                                                            |
| 2. And on being sued for the price of the purchase according to the proces verbal of sale, he will be deemed to have purchased in error affecting the substance of the thing sold.                                                                                                                                                                                                                                                                                                                                                                              |       | 8. The amount stipulated in a contract thus avoided, may be correctly used as a means to ascertain the just value of the work performed, but ought not to be considered in exclusion of all other testimony.                                                                                                                |
| <b>BAIL.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |       | 4. Where architects and undertakers are called upon to estimate the value of work and materials and differ in their opinions, the lowest estimate will be taken.                                                                                                                                                            |
| The bail has a right to file an answer and have his case tried by a jury.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |       | 5. Unless there be a contrary stipulation in a contract for building, the materials of an old house removed are, by custom, considered as belonging to the undertaker as an equivalent for his expense and labour in removing them.                                                                                         |
| <i>Gale vs Quick's bail,</i> 348                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |       | 6. In a contract to build, if the owner consent to a deviation from the original plan, he is liable to the undertaker for such extra work as may be caused by the change.                                                                                                                                                   |
| <b>BILL OF EXCEPTIONS.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |       | <i>Fossier vs. Herries</i> 494                                                                                                                                                                                                                                                                                              |
| The party who excepts to the opinion of the court must take care that the bill of exceptions contain all the facts necessary to be known in revising the opinion of the inferior court.                                                                                                                                                                                                                                                                                                                                                                         |       | <b>CITATION.</b>                                                                                                                                                                                                                                                                                                            |
| <i>Ingraham vs. White,</i> 294                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |       | 1. Although a party may be arrested and held to bail, service of the petition and citation cannot be dispensed with.                                                                                                                                                                                                        |
| <b>BROKER.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |       | <i>Walles vs. Wilson</i> 16                                                                                                                                                                                                                                                                                                 |
| One who receives a note as a broker cannot claim any property under it as a creditor of the bailer.                                                                                                                                                                                                                                                                                                                                                                                                                                                             |       | 2. Knowledge of the suit on the part of the defendant, no matter how clearly it may be brought home to him, will not suffice if this formality has not been pursued.                                                                                                                                                        |
| <i>Palmer vs. Haynes &amp; Co.</i> 370                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |       | 3. Copies of citation require no seal.                                                                                                                                                                                                                                                                                      |
| <b>BOND.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |       | <i>M<sup>r</sup> Donogh vs. Gorman</i> 311                                                                                                                                                                                                                                                                                  |
| 1. The casual insertion in a bond of an additional clause or condition not contemplated by the legislature, will not bind the surety.                                                                                                                                                                                                                                                                                                                                                                                                                           |       | <b>CITY COUNCIL.</b>                                                                                                                                                                                                                                                                                                        |
| <i>Boswell vs Lanhart</i> 397                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |       | 1. The city council have the power to establish markets, and to provide for the cleanliness and salubrity of the city.                                                                                                                                                                                                      |
| 2. If a bond be taken with reference to a particular law, it must be construed by it.                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |       | <i>Morana vs Mayor</i> 21                                                                                                                                                                                                                                                                                                   |
| <b>BUILDER.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |       | 2. They have an undoubted right to prevent the violation of any ordinance they may pass in relation to the markets.                                                                                                                                                                                                         |
| 1. Where the contractor for a building is sued for materials furnished, and the owner made party to the suit, the latter is only responsible for the costs incurred after issue joined.                                                                                                                                                                                                                                                                                                                                                                         |       | 3. They have the right to confine the sale of oysters to certain designated stands, and to prevent their being sold at any other.                                                                                                                                                                                           |
| <i>Rabassa vs. Passement</i> 178                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |       |                                                                                                                                                                                                                                                                                                                             |
| 2. A proprietor may cancel at pleasure                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |       |                                                                                                                                                                                                                                                                                                                             |

CERTIFICATE.

Where the certificate is signed by a person who styles himself judge of probates, he will be presumed to be the sole judge of the court. *Dismukes vs Musgrove* 835

CODE OF PRACTICE.

There is a clerical mistake, or typographical error, in that part of the English text of article 575 of the Code of Practice which says the appeal must be taken for "one-half the amount of the judgment," &c. It should read, "exceeding by one-half the amount," &c.

*Ross vs. Pargoud* 85

COMMUNITY.

1. The community of acquits and gains or legal partnership, is so inconsistent with the ordinary commercial partnership that both cannot exist together, and the legal supersedes the commercial.

*Squire et al vs. Belden et al* 268

2. Whether a commercial partnership can exist between husband and wife even when there is no community of acquits and gains; quere.

COMPENSATION.

1. Compensation cannot be pleaded in cases of insolvency, when the claim of the debtor to the insolvent proposed to be compensated, has been acquired by such debtor subsequently to the failure of such insolvent.

*Crain vs. Baillo et al* 82

2. A claim due from an insolvent debtor to a partnership firm, cannot be allowed in compensation of a debt due by an individual member of the firm to the insolvent.

3. Payment by a firm will not support a claim in compensation between one partner and the person for whom it was made.

*Terran vs. Delastra* 324

4. Where three individuals composed a partnership in a bakery, and two of them, by a written document (before the dissolution of the firm) acknowledged a stated amount due to the third; if this document be transferred by the latter, the transferee cannot plead it in compensation of a debt which he owes to one of the two partners.

*Gomez vs. Ramos* 426

CONSIGNEE.

1 Where mutual accounts exist be-

tween the consignor and consignee, the latter has no lien upon the goods attached in his hands, unless there be proof of a balance in his favor at the time of the attachment. *Russell vs. Buckles* 417

2 A consignee has a privilege for advances made upon goods consigned to him. *Phelps vs Haring et al* 430

CONTINUANCE.

1 If the sheriff returns that a witness is not to be found, the party praying continuance on that account, must shew that he is a resident of the parish, or that he took steps to obtain his deposition.

*Saul vs See's Curator*, 180.

2 Where a continuance is prayed for, owing to the want of a return to the commission which issued seventeen months before, the affidavit should state the causes which led to the failure, and the probable grounds of thereafter obtaining the testimony sought. *Silea vs Lafaye*, 198

3 An affidavit for a continuance, setting forth that the party is informed and believes, is insufficient if it does not contain the name of the informer.

*Traham vs McManus*, 209

4 A cause will not continue without the oath of the party that due diligence has been used. *Thompson vs Ins. Co.* 228

5 A continuance was properly refused where the party was wanting in the use of legal diligence. *Adams vs Dupuy*, 250.

6 The necessary absence of the counsel from indisposition, or his attendance on public business, entitles the client to a continuance; but he cannot claim this indulgence on the voluntary absence of his counsel in attending another court, especially when another counsel is engaged and attends, and it is not alleged that the one absent is in possession of important papers, which could not be obtained from him. *Ingraham vs White*, 294.

7 A continuance was properly denied where the party appeared generally, to have neglected the means of preparing his defense; and under such circumstances, the court did not err in refusing a new trial. *Erwin's Ex. vs Trion*, 305

8 The affidavit necessary for the continuance of a cause may be made by the person who represents the absent party; but where any thing occurs which excites suspicion that the party has absented himself to obtain a greater latitude through the oath of an agent or his attorney than he could have had were he present, the

|                                                                                                                          | PAGE                        |                                                                                                                                                                                        | PAGE |
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| continuance may be properly refused.                                                                                     |                             | sentee, and should be considered as principally beneficial to the defendant, and consequently, the plaintiff in such a case, is not bound to pay for services rendered by the curator. |      |
| 9 The oath of the attorney to facts, the knowledge of which he derives from his client, is sufficient for a continuance. | <i>Penne vs Towne</i> , 462 | <i>Pontalba vs Pontalba</i>                                                                                                                                                            | 466  |

### CONTRACT.

The master of a steamboat who contracts for repairs, is personally bound:—the parties contracting with him have a double remedy; they may sue him or sue the owners, on a contract made with their agent.

*Mead vs Buckner*, 282

### COHEIR.

Whatever right one may have against his coheirs, he cannot avail himself of it to avoid paying for property bought at the sale of the estate.

*Rills vs Questa*, 248

### COSTS.

1 The plaintiff or party who succeeds in a suit, has a right to recover his costs from those against whom he obtains judgment.

*Brasseur vs Her Husband*, 590

2 But where there are two sets of defendants, having distinct interests, as far as the judgment operates in each distinct interest or party, each one must pay his proper proportion of the costs accruing in his controversy with the plaintiff.

### CURATOR.

1 Complaints as to the conduct of a curator can only be redressed when *as curator* he presents his account. Particular acts of the representatives of estates cannot be singled out by individual creditors, and made the basis of a suit.

*Watts vs McMicken*, 182

2 A stranger, litigant in our courts, cannot have the benefit of their process and at the same time refuse obedience to their orders: so a curator, who has gone abroad, cannot obtain the aid of the court of probates for the delivery of the papers of the estate while he refuses to comply with an order to account.

*State vs Pitot*, 266

3 A curator must settle his accounts with the court of probates, or annex them to his answer and file his vouchers, in order to support the plea of fully administered.

4 A curator *ad hoc* is intended by law as a protector to the interests of the ab-

sentee, and should be considered as principally beneficial to the defendant, and consequently, the plaintiff in such a case, is not bound to pay for services rendered by the curator.

### DEMAND.

1 A demand of payment must be made at the place designated if it exist; if it does not, the plaintiff will recover without.

*Erwin vs Adams*, 316

2 Demand of payment at a place designated by the note, is a condition precedent to a recovery on it.

*Smith vs Robinson*, 406

### DEPOSITE.

The act of the creditor in withdrawing the deposite made by the debtor, of the amount which he believes to be due, is not conclusive that nothing more is owing.

*Forsyth vs Lacoste*, 319

### DONATION.

1 A donation of immovable property may be made, and stand good against creditors, where the father put his daughter and her husband in possession of land, which was afterwards sold and the price received by the husband of the daughter, and the sale ratified by the father.

*Chuchere vs Dumartrail*, 38

2 In this case the price of the land sold, will be considered as due to the father, but received by the son-in-law as a donation or marriage portion due to the daughter, which is as completely effected as if delivered from the father to the daughter.

3 A donation under the form of an onerous contract is not void.

*Tyahan vs McMannus*, 209

4 A donation disguised under the form of a stipulation, *pour autrui*, is revocable by the donor until accepted; and there are no exceptions in favor of minors.

*Disimukes vs Musgrove*, 335

5 A donation *propter nuptias* cannot be made to the prejudice of creditors.

*Mercer vs Andrews*, 558

### DEBTOR AND CREDITOR

#### In Solido.

A creditor of several debtors *in solido*, who has received a dividend from the estate of one of them, can only claim from the estate of the others, the amount due, after deducting the payment made:

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and though he may have proved his debt against each estate for the whole amount, if he subsequently receives a portion of it, from the estate of one of the debtors, his rights on the estates of the others are estimated in relation to the balance due, after deducting that payment, not by the amount of the original debt.

*Armor vs his creditors*, 376

### ERROR.

1 In a suit for the price of a tract of land sold, the defendant may successfully resist payment on account of error falling on the substance of the thing sold

*Berard's heirs vs. Berard*,

2 A party is entitled to recover when he has paid in error. *Legon vs Nav. Co.* 128

### EVICITION.

The owner who procures the eviction has a right to select whether he will pay the value of the materials and the price of the workmanship, or a sum equal to the enhanced value of the soil.

*Boatner vs Ventris*, 172

### EVIDENCE.

1 Where it is shewn the attorney acknowledged the receipt of half the amount of a claim, by receiving a note from the party payable in bank, and dismisses the suit instituted against another of the debtors under this claim, for the balance, on the suggestion that the claim is settled, and the presumption is, that he has collected the whole debt, and is accountable to the plaintiff for it, unless this presumption is destroyed by contrary proof.

*Hagan et al vs. Brent*,

2 Parole testimony is inadmissible to shew that another person was to have signed a surety bond in addition, when the bond itself does not shew the facts, or admit such an inference.

*Police Jury vs Hance et al.*

3 In a suit between the endorsee, who is the holder and the drawer and endorser of a bill of exchange, the consideration may be impeached; and the question, whether the drawer ever received consideration or payment therefor? inquired into.

*Booker vs Lastrapes*, 52

4 And where from the evidence, it appears doubtful, whether the drawer of the bill has received the value or any consideration therefor, the case will be remanded for a new trial

5 An instrument of writing under pri-

vate signature, and not proved by the subscribing witness, is still admissible as evidence of title, where it had been four years subsequent to its date recognized by authentic act; but it will only take effect from the latter date, without proof being made of the original deed.

*Scott vs Calvit et al.* 69

6 Parole testimony is admissible to prove the sale and transfer of a note payable to order, without endorsement or written transfer

*Hughes vs Harrison et al.* 90

7 One of the payees of a promissory note, who together with the other have sold or exchanged it without recourse on them, is a competent witness to prove the consideration for which the note was given.

8 The proceedings on the cession of the plaintiff's debtors are the best evidence to shew his insolvency, and are admissible as proof when judgment rendered on them is not even signed

*Pargoud vs. Morgan*, 100

9 The record of a judgment against the agent, is legal, though not conclusive evidence, of the settlement of a debt due to the principal.

10 The jury may correctly infer from the relation between the principal and agent, (they being brothers) and the long silence of the former, that the settlement was made with his consent, or was afterwards approved: in this instance, however, the cause was remanded

*Kemper vs Turner*, 149

11 Parole evidence of the *lex non scripta* of a foreign country must be received without the party offering it being required to show that there is no statute law on the subject. *Newsom vs Adams*, 158

12 The extension of a lease may be proved by parole, and the lessee is a competent witness for this purpose if he be disinterested by a release. *Mossy vs Mead*, 157

13 It is not sufficient ground to reject a witness that another has or may contradict him

*Thomas vs Thomas*, 166

14 The existence, loss, and contents of a will may be proved by parole testimony

15 A policy of insurance is good evidence to shew the fact of the vessel having been insured, but furnishes no proof as to her value.

*Silea vs Lafaye*, 198

16 A receipt, of a date posterior to the *contestatio lites*, is no evidence of the existence of the facts alleged by the pleadings against either of the parties to the suit.

*Baines vs Higgins*, 220

17 Evidence that a document had been

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- seen among the papers of a deceased person, searched for and could not be found, and that some of his papers were lost, is not sufficient to enable the party to give parole proof of its contents.
- 18 A plaintiff's warrantor is an inadmissible witness in support of the plaintiff's title. 220
- 19 It behooves the plaintiff in a possessory action, to show that he possessed as owner, or that as *usu fructuary*, he was entitled to the use, or had a real right growing from such real estate or slaves. *Preston vs Zabriskey*, 226
- 20 Testimony should be weighed by probabilities, and its truth be rather ascertained in this manner than by counting the witnesses. *Kemp vs Wamack*, 272
- 21 Where the evidence is contradictory, but preponderates in favor of the party for whom the jury find, the supreme court will not interfere with their verdict. *Mead vs Buckner*, 282
- 22 Erasures or interlineations in the substantial part of an instrument, are presumed to be false or forged, and must be satisfactorily accounted for before the instrument can be received in evidence. *McMicken vs Beauchamp*, 290
- 23 A vender of the right of mortgage, who warrants only the existence of his claim, cannot be objected to on the score of interest, to prove possession in his vendee. *Orillon vs Nerault*, 292
- 24 Parole evidence may be given of the existence of articles of partnership, but not of their contents. *Ingraham vs White*, 294
- 25 A record ought not to be rejected because different parts of it may have been obtained from the clerk at different times, where the certificate shews that the record of the whole proceedings is complete. *Dismukes vs Musgrove*, 335
- 26 In a suit upon a note, the plaintiff is not bound to prove the defendant's signature unless it be expressly denied; but if neither the allegations in the petition, nor interrogatories annexed thereto, require such denial or admission, then every means of defence is open to the defendant under the plea of the general issue. *Bennet vs Allison*, 419
- 27 The purchaser of slaves who has given his note in payment, cannot prove a condition different from that expressed in the deed of conveyance. *Goodloe vs Hart*, 446
- 28 Nor can he prove by parole, that a condition was added by consent of parties after the conveyance was executed.
- 29 A party is excluded from being a witness on the ground of interest, and when that interest ceases, the objection is removed. 49
- 30 Though a witness may, from the face of the record, appear *prima facie* interested, he should not be rejected without enabling him to explain his situation, by being questioned on his *voir dire*. *Spencer's Syndics vs Lee et al*, 472
- 31 The declarations of the plaintiff's agent are not legal testimony against the defendant, and should be rejected by the court. 49
- 32 Where a witness was permitted to testify to the contents of an account book, and after judgment, the party moves for a new trial on the ground that he has discovered where the book is, but does not state that if produced it would contradict the statement of the witness, the new trial will be refused. *Pelayein vs. Maurin*, 480
- 33 The executor cannot prove that a receipt of the plaintiff for payments made by the deceased, as attorney for the defendants, embraced a larger sum than was actually paid—this would be proving a negative. Nor can he support his testimony by an account between plaintiff and the deceased; for the defendants are no party to it. *Baudin vs. Comoy*, 512
- 34 When a stipulation is made, prolonging payment, on condition that the debtor pays interest annually; the latter must shew a performance of the condition on his part, to entitle him to its benefit. *Borel vs. Fuchier*, 567
- 35 If the defendant relies on the performance of certain conditions which entitle him to an extension of credit, he must shew by proof, a performance—the plaintiff is not required to shew a non-performance. 56
- 36 The allegation that interest was not paid is a negative assertion, which according to the rules of evidence, throws the proof on the adversary. 56
- 37 Where a slave is claimed and held as having been purchased for the defendant and with his funds, but the title is taken in the name of the person making the purchase, parole testimony is inadmissible, to prove that the purchaser acted as the agent of the defendant, and bought the slave with his funds. *Muggah vs. Greig*, 593
- 38 Written evidence must be produced



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and though he may have proved his debt against each estate for the whole amount, if he subsequently receives a portion of it, from the estate of one of the debtors, his rights on the estates of the others are estimated in relation to the balance due, after deducting that payment, not by the amount of the original debt.  
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*Police Jury vs Haire et al.* 42
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- 6 Parole testimony is admissible to prove the sale and transfer of a note payable to order, without endorsement or written transfer  
*Hughes vs Harrison et al.* 90
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  - 8 The proceedings on the cession of the plaintiff's debtors are the best evidence to shew his insolvency, and are admissible as proof when judgment rendered on them is not even signed  
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*Thomas vs Thomas*, 166
  - 14 The existence, loss, and contents of a will may be proved by parole testimony
  - 15 A policy of insurance is good evidence to shew the fact of the vessel having been insured, but furnishes no proof as to her value. *Silva vs Lafaye*, 198
  - 16 A receipt, of a date posterior to the *contestatio lites*, is no evidence of the existence of the facts alleged by the pleadings against either of the parties to the suit. *Baines vs Higgins*, 220
  - 17 Evidence that a document had been

## FRAUD.

1 A sale of property by a debtor who has not sufficient to pay all his debts, made to one set of creditors, will be considered in fraud of the rights of the remaining creditors, and will be annulled and set aside, though made in ignorance on the part of the vendees, as to approaching insolvency, and in all other respects executed with the utmost good faith.

*Taylor et al vs Knox,*

2 Questions of fraud partake of both law and fact, of acts done, and their want of conformity to morality and established law, prescribing the rules by which property is held.

*McLaughlin vs Richardson,*

3 A sale which is merely fictitious, the fraud and nullity may be only relative, and such sale might be good as a donation, or only void as to previous creditors.

4 But when a sale is made with the avowed intention to defraud, the act is so contaminating and immoral, that it entirely vitiates the contract and renders it null and void to all intents and purposes.

5 The charge of fraud cannot be supported by alleging the neglect of the officer who sold, in complying with any of the informalities required by law, unless it be shewn that the party charged was cognizant of his noncompliance, or knowingly availed himself of it.

*Dellee vs Watkins,* 306

6 The execution being unauthorized by the judgment, could confer no title on the creditor by whom this irregularity was committed.

## FRUITS.

Evidence must be received of the value of the fruits from the period when the possessor is ascertained to be in bad faith.

*Boatner vs Ventris,* 172

## HEIR.

1 The heir may institute suits before he accepts or rejects the succession.

*O'Donald vs. Loddell,* 209

2 If a defendant deny that he is heir, he cannot be made liable until it be shewn that he accepted the inheritance, although by the will, he be appointed executor and residuary legatee.

*Cotton vs. Cullen,* 371

## HUSBAND AND WIFE.

1 In all cases when the husband and wife are not separated from bed and board,

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in law the domicile of the wife is to be considered as that of her husband, and service of citation is good as to the wife, when left at the domicile of the husband, although she resides in a different parish, when they are sued jointly.

*Dugat vs. Markham et al.* 21

2 But although the husband must in all cases, unless he refuses, and then the judge authorize the wife to sue and be sued, yet the husband has no right to appear and file an answer for the wife without her consent, where she lives separately in property, and is sued jointly with her husband.

3 The construction and effect of an act of voluntary separation and of a division of property between husband and wife, made in 1825, before the adoption of either of the civil codes, must be determined by the laws of Spain.

*Labbe's heirs vs. Abat,* 55

4 According to these laws the husband and wife were considered so far separate persons, that they could validly enter into any onerous contract—a sale being the example given to illustrate this doctrine.

5 The husband and wife were prohibited from making donations to each other during marriage, of property actually in possession; but the wife might renounce her right to the acquets at any time before, during and after the dissolution of marriage.

6 A contract in which husband and wife mutually agree to separate, divide, and each take a specific portion of the community property, and renounce all right and claim to the community of acquets and gains, partakes strongly of the nature of a contract of exchange, by which each of the parties gives up all claim to the whole, in consideration of obtaining a distinct right and title to a part of the matrimonial community property.

7 Such a separation and division was strictly speaking a partition of common property and cannot be assimilated to a donation.

8 The contract of exchange, in 1805, between the husband and wife operated as a good and valid separation of goods between the contracting parties and a dissolution of the community previously existing between them, and a renunciation of the acquets and gains subsequently acquired.

9 The voluntary separation of husband and wife, did not produce a legal separation a *menso et thoro*. The husband

would still be bound to provide for her maintenance.

10 The circumstance of the husband having an adulterous intercourse with his mulatto slave in the common dwelling, may have induced the wife, the more willingly to abandon his bed; but is not such an act of legal constraint and coercion on her, or of immorality in him, as to render the contract of exchange, and dissolution of the community of property, null and void.

11 If the wife makes a concealed donation by acknowledging subsequently to the marriage, that her husband brought in twenty-five hundred dollars when in fact it was owned by her at the time, such donation by the Spanish laws is only revocable during the life time of the donor, and at her instance.

## IMPROVEMENTS.

1 A party evicted by a superior title, and who does not claim of the successful claimants the value of the improvements they have put on the land, cannot recover of a subsequent purchaser of the claimant the value of such improvements.

*Harrison et al vs Faulk et al.*

2 There is no privity of contract between the parties, after the lands have passed into the hands of subsequent purchasers; and the party evicted has no lien or tacit mortgage on the land for the remuneration of expenditures for the amelioration or value of the improvements put on the land.

## INDORSER.

The holder of a negotiable note by blank endorsement, may maintain suit on it without filling up the same to himself.

*Griffon vs Jacobs,* 192

## INSURANCE.

1 When a vessel sails under charter-party, the owners have an insurable interest in freight. *Hodson vs In. Co.* 341

2 The failure of the insured to communicate to the assurers the knowledge of the fact, that the vessel was under charter-party, is not such a concealment as will annul the policy.

3 The knowledge or information material for the insurer to know, and necessary to be communicated to him when the contract is made, is a question of fact, and the materiality of the information is

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to be determined under a consideration of all the circumstances which belong to the case.

4 If a vessel be insured for six months trading between New Orleans and any port in the West Indies, United States or Gulf of Mexico, except Rio Grande, or Brasses of St. Jago, the port of New-Orleans is made one of the *termini*, and a voyage between a port in the West Indies and the United States, is not within the policy. *Lippincott vs In. Co.* 399

5 The terms of a policy of insurance, "free from average unless general," are convertible with those of "total loss;" and to enable the assured to recover, there must be a total destruction of value — Whether a total physical destruction? — Quere. *Arrandezmendi vs In. Co.* 432

6 The preservation of the thing insured up to the time of its arrival at an intermediate port and sale there, produces the same effect as a sale at the *terminus*, unless it be shewn the cargo could not be carried there without a total loss being the inevitable consequence.

7 Where the insured, by the terms of the policy, take on themselves all risks, excepting a total loss of the thing insured, a partial destruction of the object at an intermediate port, does not discharge the warranty.

8 The circumstance of the ship being a general one makes no difference in cases of this kind.

8 Where a house is insured the back-buildings will be considered as accessories to the main building, and embraced by the policy. *Workman vs In. Co.* 507

## INSOLVENT.

1. The decree of the Supreme Court remanding a suit against a firm, one of whom is insolvent, virtually cumulates the suit with the other proceedings in *concurso.* *Warfield vs. His Creditors,* 188

2 The losses sustained by an insolvent must be shewn by the affidavit of two witnesses. *Sheppard vs His Creditors,* 315

3 One creditor cannot be called before a notary to deliberate on his or the insolvent's affairs—meetings of creditors take place in order that the minority may be compelled to abide by the decision of the majority in sums or claims, and where there are less than three creditors there cannot be a majority.

4 If an insolvent has a right to cedé his goods to an only creditor, he ought to have him cited into court. Less than

three creditors cannot form a *concurso*, for there is no minority to be coerced.

5. The syndic of an insolvent cannot, on a mere motion, be made liable *de bonis propriis*.

*Bachemain vs. His Creditors*, 846  
6 By the laws of Louisiana, where an insolvent debtor makes a cession of his goods to his creditors and they accept it, there is a transfer of the property; and a judgment obtained in the court of the U States, posterior to that transfer, cannot affect the property ceded. The State has a right to regulate property within her limits, and to say how, when, and on what conditions it shall cease to belong to one person and be transferred to another.

*Schroeders' Syndic vs. Nicholson*, 350  
7 The deliberations of creditors need not be homologated.

8 The charge of fraud against an insolvent must be made on the written depositions of a creditor, stating specially the acts of fraud. *Gouy vs. His Creditors*, 357

9 If the creditors refuse a discharge, the judge cannot grant one.

10 Where one of the joint obligors of a note given by a particular partnership fails, and places the payee as a creditor on his *bilan* for the whole amount, he is nevertheless liable but for half.

*Bennett vs. Allison*, 419

11 If an insolvent debtor, in actual custody, applies for the benefit of the insolvent laws, makes a cession of his property, which is not accepted by his creditors who do not attend, and the sheriff is appointed syndic by the court, to receive the cession, the debtor is thereby discharged from his confinement in the same manner as if the creditors had attended and accepted the surrender.

*Caldwell vs. Bloomfield*, 508  
12 Where creditors are cited at the instance of an insolvent debtor in actual custody, to attend before a notary and receive a surrender of his property, and fail to attend, or make opposition to the homologation of the proceedings within ten days after they are returned into court, they have the authority of *res judicata*, and cannot be disregarded by the creditors.

13 A surrender of property by an insolvent debtor in confinement operates a discharge of his person from imprisonment, when not opposed, and there is no breach of the conditions of the bond, occasioned thereby, which will make the obliger and his securities responsible to the plaintiff in execution.

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## INNKEEPER.

Where a person permits another who is living about his house, and sometimes doing business for him, to have access to his bar and drink his glasses without charge, in a subsequent settlement of the accounts between the parties, the innkeeper will not be permitted to make out an account for his bar bill; but such an account will be considered an after thought and be disallowed. *Grig vs. Hathern*, 3

## ILLICIT TRADE.

Illicit trade is that which is made unlawful by the laws of the country where it is to be carried to. That trade which the officers of the government may choose to designate as illegal, to suit their purposes, cannot be recognized as such by the tribunals of other countries.

*Thompson vs Insurance Co.* 25

## INTEREST.

1 Legal interest on sums discounted in bank, is the rate of interest established by their charters. The maximum of interest on notes payable more than four months after date, at the Bank of Louisiana, is nine per centum, which is the legal interest to be allowed on such judgments in their favor.

*Bank of Louisiana vs Sterling*, 64

2 Interest given by a judgment, forms a part of it, and must be calculated in and secured in the appeal bond, which together forms the judgment of the court appealed from. *Ross vs Pargoud*, 81

3 Interest cannot be allowed on a judgment given for the balance of an account between the parties, where payments have been made for costs, and on other accounts. *Baudin vs Comery*, 511

4 An action of interest cannot be maintained apart from the principal.

*Harty vs Hartly*, 517

6 Interest will not be allowed on a verdict finding a special sum in damages; and if the judgment gives interest, even from the signing it, it will be reversed. *Trimble vs Mount*, 33

## INTERROGATORIES.

1 A plaintiff who is interrogated may write his answers on one piece of paper and his oath on the other. *Ray vs Wiley*, 315

2 The defendant's answers to interro-

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gatories will not avail against the testimony of two credible witnesses.

*Bourgeois vs. Bourg* 537

3 When interrogatories are propounded to the plaintiff to be answered in open court, and no day moved for and fixed by the court on which to answer, the plaintiff's neglect to answer will not authorize the interrogatories to be taken for confessed.

*Stewart vs. Carlin et al.* 12

4 When the defendant annexes interrogatories to his answer and prays that "the plaintiff may be ruled to answer them in open court;" he must, according to the provisions of the 351st article of the Code of Practice, move the court to appoint a day for the plaintiff to appear and answer; and not having done so, he will be considered as having waived his right and dispensed the plaintiff from the obligation of answering.

5 Where an order to take depositions has been made at a previous term, and the plaintiff at whose instance it was made, takes out a commission in pursuance of it, and submits his interrogatories to which cross ones are filed, it is sufficient to entitle them to be read in evidence, although the usual affidavit has not been made and annexed.

*Rife vs. Henson,*

6 The plaintiff may interrogate the defendant as to the truth of the facts alleged in the petition; but the latter may except to an interrogatory which from a blank being left therein, or other circumstances, is rendered unintelligible.

*Perron vs. Grassier,* 152

7 The Code requires the magistrate to draw a process verbal of the taking of the depositions, annex the same to the commission and interrogatories, if there be any, and seal the same with his private seal.

*Ingraham vs. White,* 294

## INVENTORY.

When an inventory of the property of the wife is made before marriage, expressly stipulating that the property or goods brought into marriage, are to be considered as the *biens propres* of the wife, such property will be considered as *paraphernal* and not dotal.

*Gilbeau's Heirs vs. Cornier,*

## INTERVENTION.

It pending a suit the plaintiff sells his title, or the property in contest to another, the purchaser may intervene and become a party to the action.

*Marigny et al. vs. Nivet et al* 498

## INSTRUMENTS.

### Construction of.

1 The intention both of the obligor and obligee must be sought for in the true meaning and spirit under which the agreement was made, as expressed in the written instrument. *Workman vs. In. Co.* 507

2 In the construction of every instrument the ordinary and legal meaning of words must be taken into consideration. *ib*

The common and ordinary acceptation of the word house, embraces every thing appurtenant and accessory to the main building; so in legal acceptation, the sale of a house carries along with it whatever may be necessary to a full and complete enjoyment of the thing sold. *ib*

## INJUNCTION.

1 It is not enough to shew mere irregularity to obtain an injunction. Injury to the applicant, or apprehension of it, alone can authorize a resort to this extraordinary remedy for relief.

*Hudson vs. Dangerfield et al,* 63

2 Relief by injunction is an equitable remedy, and those who seek equity must do equity. 63

3 An injunction will not be dissolved even if ever so irregularly obtained, if it appears from the circumstance of the case, the party, by an immediate application, would be entitled to a new one. *ib*

4 In taking an injunction bond the officer acts under an authority of law, and inserts the name of the obligees without their consent, so that where one is properly inserted, and another unnecessarily, the bond will be valid as to the right one, and the other nugatory.

*Pargoud vs. Morgan,* 100

5 In assessing damages on an injunction bond, the jury may very properly allow the plaintiff for his reasonable costs and trouble in obtaining a dissolution of the injunction in which the bond was taken. *ib*

6 The plaintiff against whom an injunction has been obtained, may compel the defendant to prove, in a summary manner before the judge, the facts alleged in his opposition; and the proper mode of proceeding is by serving a rule on the defendant to shew cause, why his injunction should not be dissolved: upon a proper shewing, the rule will be continued to procure the necessary proof required by the seizing creditor.

*Forsyth vs. Lacoste,* 319

## JUDGMENT.

1 No matter can be urged to delay the execution of a judgment which might have been presented on a trial of the cause. *McMicken vs Millaudon*, 180

2 The judgment cannot include interest if none be given by the verdict, but such an error furnishes no grounds for an injunction, nor is it a cause of nullity.

3 A judgment rendered by a Spanish tribunal before the cession, bears interest from the judicial demand.

*Budin vs Pollock's Curator*, 184

## JUDGMENT BY DEFAULT.

1 Where no answer has been filed, a judgment by default must be taken before any final judgment can be rendered, and if final judgment be rendered without this formality, it carries with it a vice or a defect for which it may be annulled.

*Dugal vs Markham et al.* 29

## JUROR.

1 The act of 1825, declaring it not to be good cause of challenge to a juror, that he was a member of the corporation that was a party to the cause, is not repealed by the provisions of the Code of Practice.

*Mayor vs Ripley*, 844

2 A trial by jury cannot be refused on the ground that the suit commenced by motion instead of petition.

*Gale vs Quick's bail*, 848

## JURISDICTION.

1 When a plaintiff brings suit in the Court of Probates to recover property which is claimed by the defendant under a will, it will be dismissed for want of jurisdiction, as involving a question of titles to property, which the Probate Court cannot try.

*Sharp vs Knox*, 23

2 The Court of ordinary jurisdiction, i. e. the District Court, can alone try questions of title, and a suit involving the right to property, claimed under a will and confirmatory act, must be brought in this Court.

4 The law empowering a judge of the late Superior Court of the territorial government, to appoint curators to minors, &c., and grant letters of curatorship to probate judges is repealed, and that authority vested in a justice of the peace.

*Humphries vs King*, 49

4 A court is not ousted of its jurisdiction in consequence of the sole judge of

it, being interested in a suit as being personally incapacitated. *ib*

5 If a probate judge is a curator, his court is the proper and exclusive jurisdiction to compel him to account, although from personal interest he cannot sit; yet there is no other jurisdiction to try the case, which is a *casus omissus*, that the judiciary cannot supply. *ib*

6 A suit against an executor for property sold by him contrary to law, is not a suit against the estate, but against him in his own right, and therefore, cannot be brought in the court of probates.

*Bouquette's Guardian vs Donet*, 193

7. A marshal of the United States District Court, in his official capacity, is not, perhaps, amenable to a state court, and as such, cannot be controlled by it; but if in that capacity he wrongs a citizen of the state, he is individually answerable, and in her courts.

*Bauduc's Syndic vs Nicholson*, 200

8 If the petition charges the defendant with having acted under a pretended admiralty process, a plea to the jurisdiction of the court takes the fact for granted, that the process was a pretended one, and the plea is no answer to the petition. *ib*

9 Pleading to the merits is only one way of giving jurisdiction to the court. Issue joined on any other matter, unless where the incompetency of the judge is absolute, will have the same effect.

*Flower v Hagan et al.* 225

10 Claims against an executor for the payment of the testator's debts, are exclusively cognizable before the court of probates where the succession is opened.

*Smith vs Wilson*, 227

11 The court of probates has exclusive jurisdiction to decide on claims for money which are brought against successions administered by testamentary executors. *ib*

12 On the division of a parish, the former court of probates retains its jurisdiction of succession theretofore opened.

*Patoulett vs Patoulett*, 270

13 It is the sum claimed, and not that recovered, which gives jurisdiction. *ib*

*Lewis vs Clark*, 488

## LAND.

It does not follow that because the title is confirmed in the name of a third person, that the right, title, and interest, to the land covered by it, may not be in the name of the person by whom it is claimed.

*Kemp vs Kemp*, 21

LEASE.

1 If a lessee holds over without the opposition of the lessor, after the expiration of the lease, there is a tacit reconduction which binds him to pay the rent, and entitles him to hold the premises.

*Mossy vs Mead* 157

2 Although a lease is cancelled, if the lessee remains in possession he is liable for the rent, on a tacit reconduction, in the same manner as if he had held over, after the lapse of the time for which he had obtained the lease. *Foucherv Leeds*, 405

3 Judgment can only be given for the rent due at its date.

4 In an action for rent, the plaintiff will recover without adducing title, if he shew a continued possession.

*Paulding vs Dowell*, 452

LEGATEE

The universal legatee, who after taking possession of the estate, and paying the debts of it, is credited by two thirds of the succession, only loses one third of the debts due to him, or by him paid. The confusion which existed while he represented the whole estate, ceases with the eviction of part of it. *Hodder v Nelder*, 525

MANDAMUS.

1 The article 790 of the Code of Practice does not embrace the issuing a mandamus to compel an auctioneer to do his duty, it only applies to cases which have a tendency to aid the jurisdiction of the supreme court, which is appellee only.

*Winn vs Scott*, 88

2 Whether the writ of mandamus can be used for the purpose of enforcing the payment of a sum of money? Quere.

*Louisiana College vs Treasurer*, 894

3 Writs of mandamus never issue to officers charged with a public duty, to do any act, where the law vests them with a discretionary power.

MANDATE.

1 A joint authority cannot be exercised by a part of those to whom it is delegated, even after the death of one of them. *Sample et al vs Lamb's curator*, 275

2 One who exceeds the limits of his mandate, has no claim for indemnification 528

MINORS.

1 The under-tutor is the proper person to maintain an action for the recovery of

minors property which was sold to satisfy the debts of the mother.

*Chisolm vs Skillman*, 142

2 The minor who has reached the age of majority during the pending of the action, may make himself a party, but the mother cannot supply the place of the under-tutor. 15

3 The sale of minors property, or that of a succession, where the heirs are absent, must pursue the forms of law directed for its alienation, or the sale must be annulled. *Elliot vs Labarre*, 326

4 The authority of the judge of probates is necessary to enable the register

of wills to sell. The latter is merely a ministerial officer, and can make no disposition of the property of a succession unless under the direction of the judge, to whom the law entrusts it control. 16

5 The minor who attempts to recover from his tutor the price of an immovable, which the latter has sold, cannot, in case he fails to obtain the whole price, sue the purchaser for the object in his possession. *Harty vs Harty*, 518

6 Where the tutrix acquires property contrary to law, she is a possessor in bad faith, and responsible for the rents and profits. 16

7 When minors come of age they may confirm irregular alienations of their property and demand the price, or they may disavow them and claim the thing and its fruits; but they cannot do both. 16

8 Minors cannot claim interest on the value of property which remains unsold, or which they state was sold illegally. 16

9 Every settlement between the tutor and the minor arrived at the age of majority is void, which is not preceded by an account and delivery of vouchers, ten days before the receipt is signed; and these facts must appear by the receipt. 16

10 Revenue due from the time of emancipation, is due from the time the minors are emancipated by marriage; but binding one of them as an apprentice does not emancipate him. 16

11 If minors property has been sold contrary to law, their mortgage will take precedence of the liens which the purchasers may have subjected it to in their hands. 524

12 The consent or approbation of the family meeting is not required to enable the tutor to furnish security in lieu of the general mortgage: their duty is confined to estimating the value of the objects presented for special mortgage, and until their decision no change can be made

in the security of the minor.

*State vs. Pilot*, 534

13 So long as there is a possibility of obtaining a decision from those to whom the law has given the preference in deciding on the affairs of minors, the court cannot entertain the question of submitting their interest to the decision of others

## MORTGAGE.

1 No legal mortgage exists in behalf of the state, or the parish, or the property of its collecting officers, since the adoption of the Louisiana Code in 1825.

*Police Jury vs. Haube et al.* 42

2 The city has no right of mortgage on the property of individuals in consequence of their becoming securities for the city treasurer. *Blache et al v Mayor* 482

3 The syndics of an insolvent cannot release a mortgage existing on property sold by the insolvent previous to his failure, even to disencumber the property so as to receive the price from the purchaser: their powers only extend to the discharge of existing liens on property surrendered by the insolvents.

*Dorfeules vs Duplissis*, 484

4 Where syndics release a mortgage existing on property sold before the surrender by the insolvent, receive the price and place it on the tableau to the credit of the mortgage creditors, who are minors, but represented by their under-tutor, they still have their recourse on the mortgage property, because they were not cognizant to the fact of the mortgage being released.

5 The recorder of mortgages is forbidden to refuse or delay the recording of any instrument, importing or stipulating a privilege or mortgage, presented to him for that purpose; but must do it in the order of time, and without leaving any blank space between the acts as presented

*Florence vs Mercier*, 487

6 The builders and material men's privilege must be recorded in the office of the recorder of mortgages, to have effect against third persons.

7 The recorder of mortgages is liable in damages to the party aggrieved, for omitting to record, and cannot cancel a mortgage without the party, whose right is thereby destroyed, has been heard.

8 The third possessor of property subject to several mortgages, and who has purchased from his vender, a right to the first mortgage, when the property is sold by the sheriff, on the application of subse-

quent mortgagees, is entitled to be first paid out of the proceeds, although he become the purchaser himself.

*Millaudon vs Allard et al* 547

9 A mortgage in favor of an absent person, executed and registered by the mortgager, although not accepted by the mortgagee, takes precedence of a posterior mortgage duly accepted and registered.

10 A mortgage cannot be shewn to exist by parole testimony: but the right to a mortgage resulting from a transfer of a claim to which a mortgage is attached, may be proved by parole evidence.

*Moore's Administrator vs Louallier*, 571

11 The law requires a notary to make a memorandum at the foot of a note given for the payment of a sum secured by a mortgage; but it does not require him to certify the transfer of such note, or any one which is given on renewal of the original note.

12 The process verbal of sale of an estate made by the judge of probates, subscribed by the purchaser and his sureties, which stipulates or secures a mortgage on the property sold, is considered of record in the parish judges office, by being deposited and put on file in the office: it is thus deemed recorded according to the requirements of law.

## NOTARIAL ACT.

A notarial act has no effect against third persons but from the date of its registry.

*Williams vs Hagan and Co.* 122

## NOVATION.

1 If a creditor gives a receipt for a draft in payment of his account, the debt is novated.

*Hunt vs Boyd*, 109

2 The debt is not novated when the vender consents that the person proposed as endorser may, if he chose, pay the price in cash.

*Lalaurie vs Cahallen*, 401

## NULLITY.

1 An action of nullity cannot be instituted in the district court to set aside and annul a judgment of the supreme court.

*Melancton's heirs vs Broussard*, 8

2 The district court cannot take jurisdiction and sustain an action of nullity to set aside one of its own judgments after it has been passed upon by the supreme court; whether it be affirmed or not.

3 Nullity does not result from the failure to annex copies of authentic acts to



a petition. *Smith's heirs vs Blunt*, 152

4 A judgment obtained by the fraudulent representations of the plaintiff's attorney, is void.

5 In such an action, the defendant is not driven to a distinct action, but may demand the nullity whenever it is sought to be enforced. *Paxton vs Cobb*, 137

6 A party who bought his own property at a sale on a *fi. fa.* and gave a twelve months' bond, has thus far executed the judgment as to debar himself from an action of nullity. *Fluker vs Lacy*, 265

## OBLIGATIONS,

### *Joint and Several.*

1 A promissory note, beginning "I promise to pay," etc., and signed by several persons, is several as well as joint in its application; and the parties may be sued jointly and severally, and judgment rendered *in solido*.

*Bank of Louisiana vs Sterling*, 60

2 In conditional obligations the law at the time the obligation was contracted, not that in force when the condition takes place, must govern the right of the parties. *Town vs Syndics of Morgan et al.* 112

3 A promise to pay out of the proceeds of the next crop, is a time given for the discharge of an engagement, and not a condition on which the fulfillment of the obligation depends. *Johnson vs Bell*, 258

4 *Solidarity* in obligations must be express, except in the case of commercial partners. *Bennett vs Allison*, 419

## PARAPHERNAL PROPERTY.

1 The wife has the right, at any time, during marriage, to present her claim and recover the amount of her paraphernal property against her husband, and resume its administration

*Gulbeau's Heirs vs Cor er*, 6

## PARISH JUDGE.

1 At a probate sale where property is struck off to the brother of the parish judge who makes the sale, the latter may take a conveyance, and receive a valid title to the thing sold, without being considered a purchaser at his own sale.

*Scott vs Calvit et al* 69

2 But admitting it to be proved that the brother of the parish judge bought the property expressly for the latter, the nullity occasioned thereby, would be only relative, and could be taken advantage of

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only by the heirs, or creditors of the succession sold.

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ib

## PARTNERS.

1 The payment of partnership debts by a solvent partner, ought not to delay the payment to the syndic, of moneys which he was otherwise entitled to receive.

*Warfield vs His Creditors*, 189

2 On the insolvency of a partner, his syndic has a concurrent, but no exclusive right to the liquidation of the affairs. *ib*

3 A copartner has no interest in a note given to his partner not for the benefit of the firm, and which is not endorsed to him. *Terran vs Delastra*, 324

4 The sole intention of the legislature by the article 3128, was to dispense with the service of the act of pledge required by the preceding article in case of paper not negotiable

*Charbonnet vs Toledano*, 386

5 Until the accounts of the partners are settled, one partner has no action against the other, and of course prescription does not run. *Bauduc's Syndic vs Lauret*, 449

## PARTY IN INTEREST.

1 A party in interest may convey his legal title in a note to a third person, and by such conveyance, give that person a right to sue in his own name. In such a case, the defendant may offer every defence to the suit, by the agent, which he could present against the action of the principal. The agent can only be considered as the nominal plaintiff.

*Lacoste vs De Armas*, 268

## PRACTICE.

1 When a cause is remanded to ascertain a question of fact, on an appeal from a judgment, if on an examination of the evidence sent up with the new record, there appears no error, in the proceedings of the inferior judge, the judgment will be affirmed. — *March vs Church Wardens of St. Martinsville*, 4

2 In examining the evidence upon which the jury acted, if the court is unable to concur with the jury in opinion, it will, in accordance with its usual practice, remand the cause for a new trial, and the opinion of another jury.

*Montgomery vs Russell*, 67

3 If an appellant urge that the subject of the contract between the parties is illicit and the contract void, after having a-

- 96 vailed himself of its amount, to plead in reconviction and augment the sum in dispute to three hundred dollars and upwards, and be thereby entitled to appeal, such defence will be deemed as coming with an *ill grace* from the party using it, and be disregarded. *Rife vs Henson*, 96
- 4 In the progress of a suit on a note for the purchase money of a tract of land, the court will not delay the proceedings to grant an order of survey, to ascertain the supposed interference of other claims, and on the bare suggestion of the defendant that it is deficient in quantity, without any affidavit to that effect. *Faulk vs Wooldridge*, 98
- 5 A plaintiff should not be delayed in the prosecution of his rights apparently just, by a bare suggestion of deficiency contained in the defendant's answer.
- 6 After a general denial, an amended answer, setting up a want of consideration to the note sued on, cannot be received. *Calvert vs Tunstall*, 207
- 7 If it appear from the pleadings or evidence, that both parties claim under the same title, neither will be permitted to attack it. *Trahan vs McMannus*, 209
- 8 It is not too late after the jury are sworn, to strike from the record documents irregularly filed. *Baines v Higgins*, 220
- 9 The court should charge the jury not to notice a supplemental petition irregularly filed; otherwise, if no objection be made to the introduction of evidence in support of its allegation.
- 10 A co-defendant, although he reside in a different parish, must answer in that where the suit is brought. *Flower vs Hagan et al*, 223
- 11 Nothing prevents a suit being bro't for the surrender of a note not sued on.
- 12 Nothing can be assigned as error of law which could have been cured by evidence legally given at the trial.
- 13 The circumstance of the jury finding three hundred dollars damages, when only two hundred were claimed, furnishes no ground for setting aside their verdict; and for the excess, the attorney had a right to enter a *remittitur*. *Mead v Buckner*, 282
- 14 It cannot be considered an *incident in the cause*, after judgment is rendered against the defendant, to call in another party for the purpose of obtaining judgment against him: it is, on the contrary, the commencement of a new suit against the surety, growing out of the proceedings against the principal which have terminated in judgment and execution. *Gale vs Quack's bail*, 31
- 15 In a suit for the rescission of a sale of property for want of authority in the agent to sell, and of *lesion* in the price, if no decision is made by the district court on the allegation of *lesion*, it will not be noticed in the supreme court. *Livingston vs Coiron*, 441
- 12 The privilege conferred by the 249th article of the Louisiana Code, is an exception to the general rule, and cannot be extended beyond the case provided for. *Goodloe vs Hart*, 444
- 13 If a petition in intervention be answered on the merits, and the cause tried in relation to them, the right of the party to intervene cannot be questioned on appeal. *Herman vs Pfister*, 455
- 14 Holders of negotiable instruments are not required to prove the consideration they gave for them, unless specially called on to do so, by that consideration being denied in the answer. *ib*
- 15 For the government of the judicial proceedings in the United States courts within the limits of Louisiana, its laws directing the mode of practice in the courts of the state, passed prior to the 26th of May, 1824, must be looked to as the legitimate rules of practice in those of the United States, and not those rules of practice which may have been subsequently introduced by the legislative power of the state. *Bradbury et al vs Morgan et al*, 476
- 16 A suit to recover damages against intervenors or third persons in a former suit, and who obtained judgment and dismissed the plaintiffs attachment suit, is wholly untenable, while such judgment stands unreversed and unappealed from. *Adams vs Harrison*, 557
- ### PREScription.
- 1 If the plea of prescription be pleaded in the Supreme Court, the party to whom it is opposed may demand that the cause be remanded for trial upon that plea—but if it appear that substantial justice has not been done, a new trial will be ordered. *Chew et al vs Keene*, 120
2. By the laws of Spain prescription ran against a married woman during coverture, for her paraphernal rights. *Benite vs Alva*, 366
- 3 The prescription applicable to overseers does not apply to an agent employed in superintending the construction of a steam engine. This action is barred by

the prescription of one year.

*Nicholls vs Hanse et al* 332  
4 If a claim be barred by prescription, it still may be offered by way of exception.  
5 The prescription of thirty years does not necessarily extinguish all debts.

*Gravier vs Gravier*, 457

### PLEDGE.

1 When a firm contracts with certain individuals for a letter of credit, upon which it receives advances of 4200 dollars, and agrees at the same time to put notes and accounts into the hands of these individuals to indemnify them against loss, they will hold the notes, &c., thus pledged, against other creditors, although the firm is in failing circumstances, and the notes, &c., are not conveyed to the pledgees by authentic act, etc.

*Edgar vs Simons et al.* 19

2 Where negociable notes are delivered as security for a debt, and no authentic act is made to evidence the pledge, they will not confer a preference in case of insolvency.

*Devlin vs His Creditors*, 360

3 The pawnee who has not taken written evidence by an authentic act or private instrument of the pawning, cannot avail himself of it against third persons.

*Canezo's Syndic vs Cuadra*, 495

### PROMISSORY NOTE.

1 A promissory note made payable to order is transferable by endorsement, only to enable the endorser or assignee, to endorse it over, or to resist the drawers claim for compensation of sums due him from the transferor, on account of payment made before transfer, or before the note became due.

*Hughes vs Harrison et al.* 89

2 But the holder or payee of a note even payable to order, may transfer all his interest in it without endorsing it, in like manner as in a cession of goods or consignment to trustees.

3 A mutual understanding or agreement between the obligor and obligee of a note, to have the contract for which it is given rescinded, and the note cancelled, will be considered binding, although omitted or neglected to be actually carried into effect; and a recovery on the note will be withheld.

*Benson vs Smith*, 103

### PROMULGATION.

An act of the legislature, the execution

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of which is suspended by one of its clauses, or by a delay of its promulgation, may, in the meanwhile, be modified or repealed by a posterior act.

*Muyor vs Ripley*, 344

### QUASI OFFENCES.

An action for the repayment of money obtained under an unlawful agreement, is not debarred by the 3501st article of the Code in relation to quasi offences.

*Perillait vs Puch*, 428

### RECONVENTION.

1 It is not necessary to file an answer to a plea in reconvention.

*Mead vs Buckner*, 282

2 The principle that reconvention on reconvention cannot be permitted was firmly settled by our ancient laws, and the Code of Practice neither contemplates nor provides for such a mode of proceeding. But the party must object to its being filed at the time it is offered.

*Mead vs Buckner*, 282

3 Where a person enters upon vacant premises, if on being sued for the rent by the owner (who was unknown to him when he entered) he reconvenes for repairs, he will be considered not in the light of an usurper, but as possessing for the owner.

*Paulding vs Dowell* 452

### RECUSATION.

It is a good cause of recusation in a judge, that he is owner of a pew, when the plaintiff seeks to recover the ground on which the church is erected.

*State vs Lewis*, 389.

### REDHIBITION.

1 Proof of a slave having ran away once does not constitute a habit of running away.

*Ails vs Bowman*, 250

2 A slaves misrepresentation of his own name and that of his master when arrested, is not a sufficient circumstance to imply the habit of running away from a single instance.

*Bocod vs Jacobs*, 408

3 Circumstances posterior to the sale may have some weight in proving the existence of a previous habit; but the mere fact of running away after the sale, added to a single instance before, does not establish an anterior habit.

ib

4 The vender is not affected by the assertion of his broker that the slave is a good subject. Such a character is not ab-

solately inconsistent with the circumstance of his having absented himself for a few days.

5 Questions relating to redhibitory vices and defects in things sold, must be solved principally in relation to the peculiar circumstances and facts of each individual case. *Beale vs De Gouy*, 468

6 Unless the object sold be absolutely useless, it is rather the duty of courts of justice to make a fair deduction from the price, than entirely to avoid the sale, especially when the real value of the thing, bears any reasonable proportion to the price agreed on.

### RES JUDICATA.

1 There must be a plaintiff and defendant as well as judge, and an issue joined, to give a judgment the force of res judicata. *Marchand vs Gracie*, 147

2 The plea of res judicata is not sustained by a judgment of nonsuit. *Perrillait vs Puech*, 428

3 The judgment of homologation should cover the whole ground on which the minors claim is resisted, as well that of the release of the mortgage as the payment of the price received for the mortgaged premises, before it can have the effect of res judicata. *Dorfeuille vs Duplessis*, 484

4 The decree of a foreign court of admiralty is res judicata in regard to the matters decided therein. *Zeno vs Insurance Company*, 533

5 An action cannot be sustained, to set aside a former judgment of the same court, unappealed from and unreversed: it forms res judicata between the parties. *Andrews vs Harrison*, 587

### SALE.

1 When a probate judge proceeds to a public sale of property under his own order of court, he assumes the character of an auctioneer, and as such, is not answerable for his conduct, except under ordinary proceedings established by law. *Winn vs Scott*, 88

2 Where A exchanges with B the negro Jack for Aaron, and takes a bill of sale from B, providing "that if he makes a satisfactory title to Aaron by a particular day, named in the obligation or bill of sale, in that event is to be void, otherwise to be in full force and virtue." The intent of such an obligation is that B con-

veys Jack to A by a title defeasible, on his executing a good title to Aaron.

*Madry vs. Young*, 104

3 But in default of B's making a good title to Aaron, Jack is the property of A, in virtue of the bill of sale, who first exchanged him with B; on the aforesaid condition, A will hold Jack in despite of the vendee of B.

4 Where a price is agreed upon for an article which is neither weighed or delivered, and two days thereafter it be destroyed, it is not such a delay as to make the agent liable to the owner; nor is it incumbent upon the former to sue the buyer when the owner declines giving him authority for that purpose. *Lamorean vs. Fowler*, 174

5 A creditor at whose suit the property is sold, cannot treat the conveyance as a nullity. If the alienation be in fraud of his rights, he ought to bring an action to set it aside. *Truhan vs McManus* 209

6 If A direct B to purchase a cargo, and draw for the amount on C, on the protest of the bills A is immediately liable for the amount of the cargo, although B produces not the protested bills. *Daniels vs Bernham*, 243

7 If a slave be bought as a runaway, and is afterwards employed on a steam boat without permission from the owner, from which he absconds, the owner can only recover the price paid for the slave.

8 If, owing to irregularities in the proceedings, a public sale be illegal, the purchaser must return the property, for he cannot hold it under a sale which is null and void. If, on the contrary, the sale be perfect, he must pay the price and cannot keep both the property and the price he was to pay for it. *Danois vs Leeds*, 355

9 When the last bidder does not comply with the terms of the sale, the law authorizes the property to be put up again for sale; but it does not make it the duty of the vender to do so, and leaves him at liberty to pursue all other legal remedies. *Lutaurie vs Cahullen* 401

10 It is discretionary with the court to grant to the vendee a delay to comply with the conditions of the sale.

11 The tradition and not the naked consent of parties, is necessary to transfer the dominion of property. But as an actual delivery of rights and credits or of incorporeal objects, cannot be made, the

transfer, to affect third persons, must be made by delivery of the title or evidence of the debt, and notice to the debtor. 422

12. It is a principal of the laws of this state, that the property of debtors is always held liable to their creditors until a full and complete transfer and tradition is made to the purchaser.

13 Whether a contract for the purchase of tobacco not inspected, can be enforced? Quere. *Lewis vs Clark*, 438

14 A written promise to sell or convey real property is valid, notwithstanding there is no signing or written assent by the promisee. Proof of that assent may be proved by evidence *aliunde*. *Joseph vs Moreno*, 460

15. The act of adjudication confers a complete title to the object or property sold on the purchaser, without any deed or act passed before a notary by the seller *Marigny et al. vs Nivet et al.* 498

16 And the purchaser who buys according to certain definite and fixed boundaries described in the act of adjudication, takes all the lands between such bounds, although it gives him a greater quantity than that called for in his title. 450

17 A purchaser who accepts a deed for a less quantity than what is contained in the act of adjudication, does not thereby lose the right he has acquired to a larger amount of property under the sale.

18 The acceptance of a deed under such circumstances, is in the nature of a contract entered into by the purchaser in error of the rights he already possessed, and as such, is not binding on him.

19 Where A obtains a letter of credit, but before it is presented the persons who gave it, losing confidence in A, direct him not to use it; but he afterwards presents and uses it, contrary to directions, by purchasing goods on the faith of it from B; such use is a fraud practiced on B, which authorizes him to claim the goods in preference to an attaching creditor of A.

*Gasquet et al. vs Johnson et al.* 514

20. A fraudulent purchaser, who obtains property by a fraudulent representation, acquires only the naked possession, which gives no right to any of his creditors to attach it in his hands.

## SLANDER.

1 Actions for slander and defamation may be sustained under our Civil Codes, without resorting to the civil laws of

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other countries, which are said to be repealed by our statute of 1828.

*Carlin vs Stewart*. 78

2 In actions of slander and defamation of character, the jury or court must often allow damages when no special damages is shewn to have been sustained. 450

3 Professional men are often unable to exhibit positive proof of the injury done to their reputations by malicious persons and slanderers, and would be, in many cases, absolutely remediless, if a jury or a court are not allowed to find a guide in the dictates of their consciences. 450

4 On the score of quantum of damages the jury are the legitimate judges, and unless they clearly err, the verdict ought to stand. 450

5 In actions of slander and defamation of character, it is sufficient to sustain the action, to prove in substance, the words charged to have been spoken.

*Trimble vs Moore*, 577

7 In cases of this kind, slanderous words spoken, are not to be construed in a technical manner, but taken in their proper sense, and considered in relation to the idea they were intended and might convey to the bystanders, or company to whom they were addressed. 450

## SLAVE.

1 The infliction of cruel punishment on the slave by his master, is a criminal offence which must be punished by a criminal prosecution, and not in a civil action. *Markham vs Close*, 581

2 Maiming, mutilating, or cruel or inhuman treatment of a slave, is a public offence, and must be prosecuted criminally, and after conviction, the fine and other penalties for such conduct, are to be levied on the offender by the court before whom the conviction takes place. 450

3 The Civil Code treats alone of private rights of individuals, and the various rights growing out of property; but it may, in the mean time, provide in what cases a breach of the penal laws brings with it a forfeiture of private rights. 450

## SUBROGATION.

Where a builder contracts with the owner to build a house, and enters into a written agreement with third persons to slate it; the former acquires a privilege to which the latter, on certain events happening, may be subrogated.

*Florence vs Mercier*, 487

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